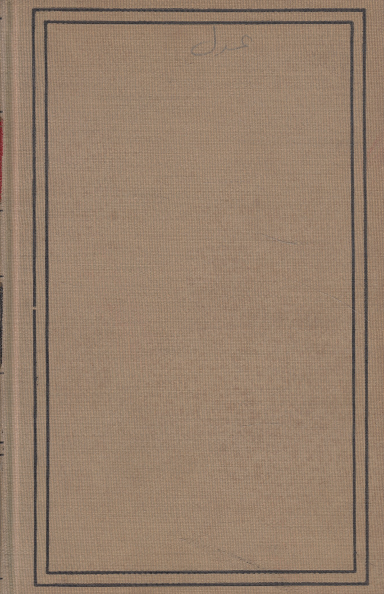








CASES DECIDED

IN

THE COURT OF CLAIMS

OF

THE UNITED STATES

MARCH 3, 1941, TO JUNE 1, 1941

WITH

REPORT OF DECISIONS OF THE SUPREME COURT IN COURT OF CLAIMS CASES

REPORTED BY

JAMES A. HOYT

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LEGISLATION RELATING TO THE COURT OF CLAIMS

[PRIVATE LAW 41—77TH CONGRESS]
[CHAPTER 104—1ST SESSION]
[H. R. 4063]

AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claim of Herbert M. Gregory.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and render judgment upon, notwithstanding the lapse of time or any provision of law to the contrary, the claim against the United States of Herbert M. Gregory, of El Dorado, Arkansas, for damages alleged to have been sustained by him as a result of the loss of and on certain property owned by him in Los Angeles, California, due to liens filed against such property, in the year 1931, by the collector of internal revenue at Los Angeles, California. Such suit shall be brought within six months from the date of enactment of this Act.

SEC. 2. There is hereby authorized to be appropriated such sum as may be necessary to pay the amount of any judgment rendered pursuant to this Act. The amount of such judgment shall be payable by the Secretary of the Treasury upon the presentation of a duly authenticated copy of the judgment of the Court of Claims.

Approved, May 9, 1941.



CASES DECIDED

IN

THE COURT OF CLAIMS

March 3, 1941, to June 1, 1941

THE CREEK NATION v. THE UNITED STATES

[No. L–206. Decided March 3, 1941]

On the Proofs

Indian claims; payment of attorney's fee by authorized agents of the nation.—Where payment was made by the duly authorized delegates of the Creek Nation on a contract for attorney's fees, which contract was not submitted to nor approved by the Secretary of the Interior, and where said payment was made pursuant to an agreement between the parties, ratified by both the National Council of the Creek Nation and by the Congress of the United States, and where said payment was made in exact accord with the agreement and the said acts of ratification and in compliance with the requests of the plaintiff made pursuant thereto; it is *held* that the defendant is not liable to the plaintiff for any failure or neglect "to institute suit for the benefit of said nation to recover said sum * * * in disregard of its duty as trustee."

Same; provisions of section 2103, Revised Statutes.—Section 2103 of the Revised Statutes creates no liability on the part of the Government for failure to bring suit, vests no right in any Indian tribe, and does not even direct the defendant to institute suits for the recovery of money paid out under a contract entered into in violation of its provisions but merely permits the use of the name of the United States in a suit brought by some private party to recover such sums.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. This case was timely filed pursuant to authority granted by Congress by the act of May 24, 1924 (c. 181, 43 Stat. 139), as modified by Joint Resolution of May 19, 1926 (44 Stat. 568), and by the act of February 19, 1929 (45 Stat. 1229). Under these acts jurisdiction was conferred on this court—

> * * * to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Creek Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian affairs. * * *

2. By the treaty of June 14, 1866 (14 Stat. 785), the Creek Nation ceded to the United States the western half of its domain "to be sold to and used as homes for such other civilized Indians as the United States may choose to settle thereon." Subsequently, and on March 3, 1885, Congress authorized the President to negotiate agreements with the Creeks and others for the purpose of making said lands available for settlement under the homestead laws of the United States (c. 341, 23 Stat. 362, 384). Pursuant thereto, the Secretary of the Interior entered into an agreement with Pleasant Porter, David M. Hodge, and Esparhecher, delegates representing the Creek Nation, whereby that Nation ceded to the United States "without reservation or condition, full and complete title to the entire western half of the domain" previously ceded for the purposes stated by the treaty of June 14, 1866.

This cession was in consideration of payments to be made to the Creek Nation of $2,280,057.10, of which amount it was provided that $280,857.10 would—

> * * * be paid to the national treasurer of said Muscogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same, at such times and in such sums after the due ratification of this agreement (as hereinafter provided) as shall be directed and required by the national council of said nation, * * *.

3. This agreement was ratified by the National Council of the Creek Nation on January 31, 1889, by an act which reads in part as follows:

* * * and the said amount which is to be paid in money, to be paid over in such sums and at such times and places as may be required, directly to the National Treasurer of the Muskogee Nation, or to such officer or other person or persons as shall be named in the requisition of the proper authorities of the Muskogee Nation; and the proper authorities of the Muskogee Nation, for the purpose of making such requisition or requisitions, is hereby declared to be the National Council of the Muskogee Nation, or such officer or other person or persons as shall be designated and authorized by an Act or Resolution of the said National Council for that purpose; and such requisition or requisitions, when made, shall be taken and accepted as, and is, and are, hereby declared to be the requisition of the proper authorities of the Muskogee Nation.

On the same day and the following day the National Council of said Nation passed two acts designating the Principal Chief as the person to make the requisitions. The first reads in part as follows:

> I. Be it enacted by the National Council of the Muskogee Nation, that the Principal Chief of the Muskogee Nation, be and he is, hereby authorized and directed, for and on behalf of the Muskogee Nation, to make requisition upon the proper authorities of the United States, in such form as may be required by such authorities, for the payment to Pleasant Porter, David M. Hodge, and Esparhecher, the duly authorized delegates of the Muskogee Nation, or in the event of the death or inability to act, or any or either of them, then to the surviving member or members of them, of the sum of ten percent of the additional price of the lands ceded to the United States by the treaty of 1866, under the agreement of January 19th, A. D. 1889, between Honorable William F. Vilas, Secretary of the Interior, and said delegates, the same to be paid out of the amount that may be appropriated by Congress to be paid in money to the Muskogee Nation on account of the purchase of said lands. The same to be paid in such sums and at such times and places as shall be requested by said delegates, and such requisition when made, shall be taken and accepted as, and is hereby declared to be, the requisition of the proper authorities of the Muskogee Nation.

The second act reads in part as follows:

> I. Be it enacted by the National Council of the Muskogee Nation, that the Principal Chief of the Muskogee

Nation, be, and he is, hereby authorized and directed for and on behalf of the Muskogee Nation, to make requisition upon the proper authorities of the United States, in such form as may be required by such authorities, for the payment to Pleasant Porter, David M. Hodge, and Esparhecher, the duly authorized delegates of the Muskogee Nation, or in the event of the death or inability to act of any of them, then to the surviving member or members of them, of the sum of Forty-two thousand one hundred and ninety-eight dollars ($42,198.00) out of the amount that may be appropriated by Congress to be paid in money to the Muskogee Nation on account of the purchase of the lands ceded by the treaty of 1866, under the agreement of January 19th, A. D. 1889, between Honorable William F. Vilas, Secretary of the Interior, and the said delegates. The same to be paid in such sums and at such times and places as shall be requested by said delegates, and such requisition when made shall be taken and accepted as, and is hereby declared to be, the requisition of the proper authorities of the Muskogee Nation.

4. At the time the Creek delegates entered into the aforementioned agreement with the Secretary of the Interior, and prior to the passage of the acts of the National Council of said tribe, as above set out, the said delegates wrote the Principal Chief of the Creek Nation enclosing a copy of the agreement, in which letter they said:

On account of the vast interests involved and the many legal questions to be determined, we deemed it essential, at the outset to employ an Attorney to advise and assist in conducting the negotiations, and also in securing the necessary appropriation by Congress.

Acting therefore, upon our own judgment as well as through your advice, we employed the Honorable Samuel J. Crawford and entered into a contract with him subject to ratification by the Council to act as our Attorney, Solicitor, and Counsel and agreed to pay him ten per centum of whatever amount we might receive for said Oklahoma lands.

With the assistance of said Attorney, we prepared and on the 27th day of December last, submitted to the Government of the United States, through the Honorable John H. Oberly, Commissioner of Indian Affairs, a proposition as the basis for such negotiations, of which the following is a copy:

* * * * *

Should our action in this matter be approved and ratified by the Council, it will also be necessary for the Council to ratify the contract made with Hon. Samuel J. Crawford, our Attorney, in order to enable us to fulfill and carry out our agreement with him, and close the matter up in a manner satisfactory to all who have rendered valuable assistance in the premises. In the management of this important matter, we have endeavored to subserve the best interests of the Muskogee Nation, and if we have succeeded to the satisfaction of our people, we shall be contented.

We herewith forward drafts of the following Acts which it is necessary for the Council to pass and should be passed exactly as they are written without the change of a single word, if success is to be achieved.

1st. An act ratifying and confirming the sale.

2nd. An act confirming contract made with the Hon. Samuel J. Crawford.

3rd. An act asking for the appropriation and payment of the price agreed upon.

4th. An act authorizing requisition to be made for ten per cent of the additional price agreed upon.

5th. An act authorizing requisition to be made for $42,198 to settle the McKee note.

5. On March 1, 1889, Congress ratified the agreement (c. 317, 25 Stat. 757, 759). Section 4 of the act reads as follows:

That the Secretary of the Treasury is hereby authorized and directed to pay, out of the appropriation hereby made, the sum of two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents, to the national treasurer of said Muscogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same, at such time and in such sums as shall be directed and required by the national council of said nation, and the Secretary of the Treasury is hereby further authorized and directed to place the remaining sum of two million dollars in the Treasury of the United States to the credit of said Muscogee (or Creek) Nation of Indians, to be held for, and as provided in said articles of cession and agreement, and to bear interest at the rate of five per centum per annum, from and after the first day of July, anno Domini eighteen hundred and eighty-nine; said interest to be paid to the treasurer of said nation annually.

Prior to the passage of this act, and on February 11, 1889, the Secretary of the Interior wrote to the Chairman of the House Committee on Indian Affairs as follows:

SIR: I have the honor to advise you that, since the making of the agreement for the relinquishment and cession of the claims of the Muscogee or Creek Nation to the lands which were ceded to the United States in the treaty and cession of 1866, I have learned that a contract which was made between that Nation and the Honorable S. J. Crawford for the special services of Mr. Crawford in presenting the claims and interests of that Nation, which contract was dated on the 4th day of February 1885, and made with him by two delegates of the said Nation, but which was subsequently disaffirmed by a letter to the Commissioner of Indian Affairs, signed by the principal chief of said Nation, had been practically renewed by the delegates of the said Creek Nation with whom the agreement of cession now pending before Congress was negotiated, and that an act of ratification of the said agreement was recently passed by the national council of the said Creek Nation. The recent agreement of cession was made by me without the intervention of any attorney, but directly; and I have not been cognizant of the extent or value of any services which have been rendered by Mr. Crawford in the past upon the request of the present delegates, or of any former delegates, of that Nation. Declining to approve the contract, Mr. Crawford has surrendered it at my request, and expressed his willingness to accept in compensation such sum only as the national council of the Creek Nation shall deem to be a just compensation for his services and such as they may be willing to pay him by a direct act of their council for that purpose. It is suggested, however, that under the statutes of the United States authority is necessary to be conferred by congress upon the Creek Nation to give and upon him to receive any sum of money in payment of his services in this behalf. It has seemed to me that this was the proper course for this business to take. Whatever may be justly due from the Creek Nation, in view of its advanced position among Indian nations and its independent powers, may properly be left to itself to adjust and pay.

I therefore transmit herewith copies of the papers referred to, and a suggestion of such an amendment as, in my opinion, would, if the judgment of congress approved that course, effectuate the object, all of which is

respectfully submitted for the consideration of the committee.

6. On March 12, 1889, the Principal Chief of the Creek Nation made two requisitions on the Commissioner of Indian Affairs, the first of which reads in part as follows:

> * * * hereby makes requisition, on behalf of the Muskogee (or Creek) Nation, for the payment to Pleasant Porter, David M. Hodge, and Esparhecher the duly authorized delegates of the Muskogee (or Creek) Nation or to their order, of the sum of Two hundred and twenty-eight thousand and eighty-five dollars and seventy-one cents ($228,085 & 71/100) being ten per cent of the additional price of the land sold to the United States under the agreement of January 19th, 1889 in accordance with an Act of Congress entitled An Act to ratify and confirm an agreement with the Muskogee (or Creek) Nation of Indians in the Indian Territory and for other purposes approved March 1st 1889—Said sum to be charged to the appropriation of Two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents ($280,857 10/100) to be paid in money to the National Treasurer of said Muskogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same at such time and in such sums as shall be directed and required by the National Council of said Nation, under said Act.

The second requisition reads in part as follows:

> * * * hereby makes requisition on behalf of the Muscogee (or Creek) Nation for the payment to Pleasant Porter, David M. Hodge, and Esparhechar the duly authorized delegates of the Muscogee (or Creek) Nation or to their order of the sum of Forty Two Thousand one hundred & Ninety eight Dollars in accordance with an act of Congress entitled An act to ratify and confirm an agreement with the Muscogee (or Creek) Nation of Indians in the Indian Territory and for other purposes approved Mch 1" 1889. Said sum to be charged to the appropriation of Two hundred & Eighty Thousand Eight hundred and fifty seven & 10/100 Dollars to be paid in money to the National Treasurer of said Muscogee (or Creek) Nation or to such person as shall be duly authorized to receive the same at such time and in such sums as shall be directed and required by the National Council of said Nation under said act.

Pursuant thereto, on March 13, 1889, the Treasurer of the United States paid to the three above-named delegates the sum of $270,283.71. Of this amount said delegates paid to Samuel J. Crawford, or to others designated by him, the sum of $228,058.71 as attorney's fees, and they paid $42,198.00 in settlement of the McKee note, the principal amount of which was $84,000.

7. The contract executed by the delegates, on behalf of the Creek Nation, with Samuel J. Crawford, providing for the payment of 10 percent of the amount received by the Creek Nation as attorney's fees for his services during the negotiations, was not submitted to the Secretary of the Interior for approval and was never approved by him. On the contrary, the Secretary, learning of the execution of this contract, demanded that it be surrendered to him, which was done.

8. Complaint having been made by certain members of the Creek Nation that said payments were unlawful, the Secretary of the Interior, on the recommendation of an agent of that department who had made an investigation of the transaction, referred the matter to the Attorney General of the United States, who replied to the Secretary of the Interior in part as follows:

> Finally, the language of section 2103 provides for an action, in the name of the United States, but evidently upon the relation of some private person, or persons. It does not provide in terms for an action by the United States through the Attorney General. My first inclination was, if an action was to be brought, to bring it myself to the end that whatever might be recovered should go to the use of the real beneficiaries, instead of a moiety going to the person or persons through whom the action should be prosecuted. My right and power to bring and maintain such an action is, however, so doubtful that I have determined not to do so, and I am better satisfied with this conclusion from the fact that under the direct language of the statute the name of the United States is at the service of these people, and if they choose so to do representatives of the Creek people can, in the name of the United States, assert whatever rights they may be advised by private counsel they have in the premises, without the interposition of the Attorney General.

9. Subsequently, on April 8, 1890, an action was brought in the United States Circuit Court for the Western District of Arkansas under the provisions of Revised Statutes, sec. 2103, the style of which is as follows:

> The United States on the Relation of Daniel Noonan McIntosh, William Fisher, William Elijah Gentry, Elijah Hermogine, Lerblance, Roley McIntosh and Wallace McNac, complainants, v. Samuel J. Crawford, Clarence W. Turner, Pleasant Porter, Albert Pike McKellop, David M. Hodge, Isaprechee or Esparhecher, Legus C. Perryman, A. J. Brown, John F. Brown, and George W. Stidham, Sr., respondents.

The court quashed the summons as to Samuel J. Crawford because he was beyond the jurisdiction of the court. As to the other defendants it was held that the payments to them were authorized by section 4 of the act of March 1, 1889, *supra*. No appeal was taken from this judgment.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff alleges in its petition that a certain payment made by the duly authorized delegates of the Creek Nation to Samuel J. Crawford on a contract for attorney's fees, which had not been approved by the Commissioner of Indian Affairs, was in violation of section 2103 of the Revised Statutes of the United States, and that the defendant is, therefore, liable to it, because it had "failed and neglected to institute suit for the benefit of said Nation to recover said sum * * *, in disregard of its duty as trustee."

The payment was made pursuant to an agreement between the parties, ratified by both the National Council of the plaintiff and by the Congress, and was paid in exact accord with the agreement and the acts of ratification and the requests of the plaintiff made pursuant thereto. The agreement made between the representatives of the plaintiff and of the defendant provided for the payment of $2,280,857.10 for lands ceded the defendant, and of this amount, it provided, "two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents shall be paid to the national treas-

urer of said Muscogee (or Creek) Nation, or to such other person as shall be duly authorized to receive the same." In ratifying this agreement Congress said:

> That the Secretary of the Treasury is hereby authorized and directed to pay, out of the appropriation hereby made, the sum of two hundred and eighty thousand eight hundred and fifty-seven dollars and ten cents, to the national treasurer of said Muscogee (or Creek) Nation, or to such person as shall be duly authorized to receive the same, * * *.

This is in strict compliance with the agreement.

The act of the National Council of the Creek Nation provides:

> * * * the said amount which is to be paid in money, to be paid over in such sums and at such times and places as may be required, directly to the National Treasurer of the Muskogee Nation, or to such officer or other person or persons as shall be named in the requisition of the proper authorities of the Muskogee Nation; * * *

and on the same day another act was passed providing that the Principal Chief of the Creek Nation was authorized and directed to make requisition—

> * * * for the payment to Pleasant Porter, David M. Hodge, and Esparhecher * * * of the sum of ten percent of the additional price of the lands ceded to the United States by the treaty of 1886 * * * The same to be paid in such sums and at such times and places as shall be requested by said delegates * * *.

Pursuant thereto, on March 12, 1889, the Principal Chief of the Creek Nation made the requisition called for, and the money was paid as requested.

How it is possible for liability to have been incurred by the defendant for having followed to the letter the provisions of the agreement and of the acts of the legislative bodies of the two parties ratifying the agreement, is beyond our comprehension. Certainly section 2103 of the Revised Statutes creates no such liability. This act vests no right in any Indian tribe. It does not even direct the defendant to institute suits for the recovery of money paid out

under a contract entered into in violation of its provisions. It merely permits the use of the name of the United States in a suit brought by some private party to recover such sums. Such a suit was in fact brought, and it was decided adversely to the plaintiff.

The money was paid to the plaintiff's representatives in strict accord with the agreement and without any restrictions as to what they should do with it. It was paid to Samuel J. Crawford or on his order, not by the defendant, but by plaintiff's representatives, and they, it may be said, in so doing, were acting according to instructions of the National Council of the Nation.

There is no merit in plaintiff's petition, and it will therefore be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

HAZEL L. FAUBER, ADMINISTRATRIX, C. T. A., v. THE UNITED STATES

[No. 41941. Decided March 3, 1941]

On the Proofs

Patents for hydroplane boats; assignment of exclusive rights in a limited field.—Where patentee made an assignment to another providing that all the rights under the two patents in suit were transferred to the assignee only "insofar as they relate to the exclusive use thereof in connection with the manufacture, use, and sale of hydroplane boats, or the like, primarily designed not to leave the surface of the water and not including toy and model boats too small to carry one person, together with the right to sue for and recover profits and damages for past or future infringements of any one or all of said patents," it is *held* that said transfer was of exclusive rights in a limited field and did not convey title to the patents. *Gamewell Fire-Alarm Telegraph Co.* v. *City of Brooklyn*, 14 Fed. 255, cited.

Same.—While an exclusive licensee as to one field of use, the assignee was a nonexclusive licensee under the patents, and as such was not a necessary party plaintiff in the instant suit since the interests of assignee are not affected by the claim made

Syllabus

in the instant suit, which involves only hydroplane boats primarily designed to leave the water. *Mallory & Co. Inc.* v. *Automotive Manufacturers' Outlet, Inc.*, 45 Fed. (2d) 810, cited.

Same; patentee's knowledge of his invention's utility.—Whether or not the patentee knew of the utility of his invention for other purposes than set forth in his patent is *held* to be immaterial, since he was entitled to all the uses of his invention. *Diamond Rubber Tire Company of New York* v. *Consolidated Rubber Tire Company*, 220 U. S. 428, 435, cited.

Same.—When defendant's seaplanes are on the water, their pontoons or hulls, having hydroplane surfaces, are hydroplane boats and are within the inventions specified in the claims of the patents in suit; and when in the air the pontoons or hulls are still boats, though not functioning as such.

Same; intention of Congress; statute of limitation.—The intent and purpose of Congress in enacting the special jurisdictional act conferring jurisdiction upon the Court of Claims to hear, examine, and adjudicate and render judgment on the claim of plaintiff "notwithstanding the lapse of time or the statute of limitations" was to waive and remove any bar under section 156 of the Judicial Code which would otherwise operate as a limitation during the period for which plaintiff could recover compensation.

Same.—Congress intended not only to waive the limitation on the right to institute a suit upon the patents in suit but also to waive the limitation on the period for which recovery might be had.

Same; validity; infringement.—Upon the evidentiary and ultimate facts, it is *held:*

(1) That claims 1, 2, 5, and 6 of the first patent in suit No. 971029, and claims 1, 2, and 29 of the second patent in suit No. 1024682, are invalid; and that claims 4 and 5 of the second patent are valid.

(2) That the terminology of claim 4 of the second patent, No. 1024682, is applicable to the Government structures known as the Aeromarine Model 40, the H. S. type hull, and the NB-1 float, and in the manufacture and use of these structures the defendant has infringed said claim 4 of the second patent in suit.

(3) That the terminology of claim 5 of the second patent, No. 1024682, by reason of the limitations therein, is not applicable to any of the alleged infringing structures of the defendant, and claim 5 has not, therefore, been infringed.

Same; determination of definition.—The definition of the term "hydroplane boat" used in the patents is not to be determined solely from the illustrated disclosures of the patents,

which show no wings, but do not exclude wings; hydroplane boats may or may not be provided with wings. *Smith* v. *Snow et al.*, 294 U. S. 1, 11, cited.

Same; patentee's recognition of applicability.—Whether or not the patentee in the patents in suit recognized that his hydroplane boat was utilizable as an adjunct to the flying machine is of no moment. *Kennicott Co.* v. *Holt Ice & Storage Co.*, 230 Fed. 157, 160, and similar cases cited.

Same; infringement not affected by addition to patented structure.—The addition by the defendant to the hydroplane boat covered by the patents in suit of the aeroplane superstructure does not affect the ultimate question of infringement. *Cimiotti Unhairing Co. et al.* v. *American Unhairing Machine Co.*, 115 Fed. 498, 504, and similar cases cited.

The Reporter's statement of the case:

Mr. Gorham F. Freer for the plaintiff.

Mr. C. P. Goepel, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Frank H. Harmon* was on the brief.

In this case plaintiff claims $2,000,000 as compensation for the alleged unauthorized use by the defendant of two United States patents issued to William H. Fauber, now deceased, in 1910 and 1912, for a "Hydroplane Boat" and for "Construction of Boats and Ships", respectively. It is contended that certain inventions described and claimed in these patents were embodied and used by the defendant in the construction of certain hydroaeroplanes. Defendant contends, first, that the claims of both patents in suit are invalid because anticipated by the prior art; and, second, that none of the claims in suit has been infringed by any of the defendant's structures.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. This is a suit for alleged infringement of United States Letters Patent #971,029 issued September 27, 1910, for "Hydroplane Boat," and United States Letters Patent #1,024,682 issued April 30, 1912, for "Construction of Boats and Ships." These patents are hereinafter referred to as the first and second patents in suit, respectively.

The patents were issued to the inventor, William Henry Harrison Fauber, a citizen of the United States, who died July 29, 1928, and the plaintiff in this case is Hazel L. Fauber, duly appointed administratrix of the estate of William Henry Harrison Fauber. Copies of the patents in suit, plaintiff's exhibits 1 and 2, respectively, are by reference made a part of this finding.

2. The patents in suit having expired on September 27, 1927, and April 30, 1929, respectively, prior to the filing of the original petition on April 26, 1932, and the amended petition on March 24, 1937, this Court is vested with jurisdiction to determine the issues under the said patents in suit, notwithstanding the lapse of time or the statute of limitations, by virtue of a special act of Congress entitled "An Act conferring jurisdiction upon the Court of Claims of the United States to hear, adjudicate, and render judgment on the claim of Hazel L. Fauber, as Administratrix, C. T. A., under the Last Will and Testament of William Harrison Fauber, Deceased, against the United States for the use, or manufacture of inventions of William Harrison Fauber, Deceased," duly enacted by the 71st Congress and approved by the President on March 3, 1931, 46 Stat. 2134 (Part 2), which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States, notwithstanding the lapse of time or the statute of limitations to hear, examine, adjudicate, and render judgment under the Act of June 25, 1910 (Thirty-sixth Statutes at Large, chapter 423, page 851), as amended July 1, 1918 (Fortieth Statutes at Large, chapter 114, pages 704, 705; United States Code, title 35, section 68), on the claim of Hazel L. Fauber, as administratrix, C. T. A., under the last will and testament of William Harrison Fauber, deceased, or her successor, as the legal representative of the estate of said decedent, for the use of or the manufacture by or for the United States without license of the owner thereof or the lawful right to use or manufacture the same, of certain inventions of said William Harrison Fauber, deceased, described in or covered by Letters Patent Numbers 971029, 1024682, and 1121006,

issued by the Patent Office of the United States on September 27, 1910, April 30, 1912, and December 15 1914, respectively.

SEC. 2. That from any decision in any suit prosecuted under the authority of this Act an appeal may be taken by either party as is provided for by law in other cases.

Approved, March 3, 1931.

A copy of the report of the Committee on Claims and which relates to the above-quoted act, plaintiff's exhibit 11, is by reference made a part of this finding.

3. The question of the amount of recovery, if any, is reserved until after the determination by this Court of the questions of validity and infringement.

4. Both of the patents in suit relate to the hull construction of what is known as "hydroplane boats."

A hydroplane boat may be defined as one which is so constructed as to receive support when in motion from the dynamic reaction of the water upon surfaces, technically referred to as "hydroplanes," the dynamic reaction of the water acting upon these surfaces to raise the hull partly out of the water, thereby lessening the submerged area of the hull with a consequent reduction of skin resistance, thus causing the boat more or less to plane or travel on the surface of the water and thereby permitting a relative high speed in proportion to the propulsive effort.

5. The alleged infringing structures comprise and are limited to various forms of hull construction utilized in seaplanes and flying boats, the various types of which are included in the generic term of "hydroairplane."

A hydroairplane consists of a hull or pontoon member or members associated with an airplane, and is capable of maneuvering on the surface of the water, taking off, flying or maneuvering in the air and subsequently alighting on the surface of the water.

While maneuvering on the water the hull possesses all the characteristics and functions of a boat. These characteristics and functions exist irrespective of the fact that propulsive effort is obtained by means of an air propeller instead of a water propeller.

In order to keep the length of the take-off run to a minimum, one of the essential features of the hull construction is that of readily and quickly obtaining a high speed in the water in proportion to the propulsive effort, and the hull construction must therefore be of an efficient type.

6. The principles of hydroplane construction disclosed in and forming the basis of the two Fauber patents in suit have been generally recognized by those skilled in the art as of considerable practical value in speedboat construction and have been widely used in boat hull construction, and licenses have been granted under the patents.

Under date of June 27, 1923, Fauber entered into an agreement with Gar Wood, Inc., conveying to the Gar Wood corporation certain rights in connection with the patents in suit. This agreement reads as follows:

ASSIGNMENT OF INTERESTS IN PATENTS

For and in consideration of One Dollar and other valuable considerations in hand paid, receipt of which is hereby acknowledged and confessed.

I, William Henry Fauber, of Brooklyn, New York, sole owner of the following described Letters Patent of the United States and of all rights thereunder, to wit:

Patent No. 920,849, Hydroplane Boat, dated May 4, 1909.
Patent No. 956,487, Hydroplane Boat, dated Apr. 26, 1910.
Patent No. 971,029, Hydroplane Boat, dated Sept. 27, 1910.
Patent No. 1,121,006, Hydroplane Boat, dated Dec. 15, 1914.
Patent No. 1,024,682, Construction, Boats and Ships, dated Apr. 30, 1912.

do hereby sell, assign, and transfer unto Gar Wood Inc., a corporation existing under and by virtue of the laws of the State of Michigan, and doing business at Detroit, Michigan, its successors or assigns, the exclusive right in and to each of said patents, and all rights thereunder and any improvements thereon or relating thereto which I may in the future make, patent or acquire, insofar as they relate to the exclusive use thereof in connection with the manufacture, use and sale of hydroplane boats or the like, primarily designed not to leave the surface of the water and not including toy and model boats too small to carry one person, together with the right to sue for and recover profits and damages for past or future infringement of any one or all of said patents; the same to be held and enjoyed by the said Gar Wood Inc., its successors or assigns, as fully and entirely as

the same would have been held and enjoyed by me had this assignment, sale, and transfer not been made.

Witness my hand and seal this 27th day of June, 1923, at Detroit, Michigan.

(Signed) WILLIAM HENRY FAUBER.

Witnesses

(Signed) HORACE G. SEITZ,
(Signed) OTTO F. BARTHEL.

STATE OF MICHIGAN,
County of Wayne, ss:

On this 27th day of June in the year of one thousand nine hundred and twenty-three, before me, a notary public in and for said county, personally appeared William Henry Fauber, to me known to be the same person described in and who executed the within instrument, acknowledging the same to be his free act and deed.

[SEAL] (Signed) KARL H. BUTLER,
Notary Public.

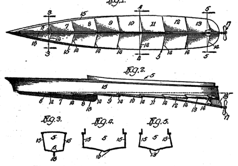
My commission expires Oct. 10, 1924.

Fauber retained all rights with respect to hydroplane boats primarily designed *to leave* the water (hulls or pontoons of hydroaeroplanes) and only boats of this type are here involved. Therefore Hazel L. Fauber, as administratrix, is properly sole plaintiff in this suit.

7. The structure to which the first patent in suit #971,029 is directed (plaintiff's exhibit 1) is a hydroplane boat provided with a bottom formed of a plurality or a series of surfaces or members located at each side of the central or keel line. These members possess the dual function of forming the flotation surface of the bottom and acting as hydroplanes and are arranged in stepped relation with each other.

The rear of each hydroplane member or surface forms a setback shoulder or step with respect to the adjacent forward end of the next succeeding member. These hydroplane surfaces are inclined laterally and downwardly from the chine or margins of the boat to the keel thereof so that in cross-sectional form the hydroplane members form a V-shaped section from chine to chine (side to side) of the boat.

The patent discloses two forms. Figs. 1 to 5 of the patent are reproduced herewith:



Figures 1 to 5, U. S. Patent to Fauber, #971029.

The hydroplane members are progressively deeper in the water from the bow to the stern, as measured from the waterline when the hull is at rest and supported by flotation, and they are of *concave* V form in cross-section from chine to chine.

In Figs. 6 to 9 in the patent in suit the forward hydroplane members measured from the rest waterline are progressively deeper in the water from the bow to a point approximately just aft of the midsection of the boat, the after-members being substantially all of the same depth. In the form disclosed in Figs. 6 to 9, all hydroplane members form a *straight* V-section from chine to chine of the boat.

In both forms the boat has a pointed bow so that the width of the hydroplane members gradually increases from the bow to the widest part of the boat.

When the boat starts from rest and its speed is gradually increased by means of the propeller at the stern the hydroplane members function to divide and deflect the water against the next succeeding hydroplane member to the rear, causing the boat to rise in the water and thus lessening its

displacement. As the speed increases the displacement decreases and the boat automatically regulates its own depth or degree of displacement in accordance with the speed.

8. The specification sets forth the advantages of what may be termed the straight V type and the concave V type of hydroplane surfaces.

The introductory clause to this discussion reads as follows:

> While this concave construction or concave form in the hydroplane members, is preferred by reasons hereinafter stated, yet so far as general results are concerned the same may be flat, as illustrated in Figs. 6 to 9, inclusive, and hereinafter described.

Page 2, lines 73 to 115, inclusive, of the patent sets forth the advantages of the straight V construction as follows:

> The advantages gained by the construction described in the hull of the boat may be understood from the following: I have found that flat, transverse hydroplane surfaces have greater sustaining power at the center than at the sides thereof for the reason that the water escapes more quickly near the outer lateral edges of such hydroplane surfaces. The result is that a boat having flat hydroplane surfaces rides in effect on a ridge of water and is therefore lacking in stability. Such lack of stability is especially manifest in rough or disturbed water. Moreover, a boat provided with hydroplane members of transversely flat form are found not to respond promptly and accurately to the steering mechanism. By making the hull of the boat with its bottom of V-shape, as described, the objections stated are largely avoided and a hydroplane boat is produced which is capable of successful use under conditions of high winds and in seas more or less rough or disturbed, while at the same time greater stability and increased carrying power is given and the boat will respond more promptly to the steering mechanism. Moreover, the making of the V-shaped bottom with its side portions at greater inclination at the stern than at the bow of the boat, affords the advantage of enabling the boat at high speed to carry a part of the load by displacement.
>
> The greater stability afforded by making the hydroplane members of transversely V shape, is due to the increased area of displacement at the low side of the hull when the boat is laterally inclined, which affords a self-righting action, due to the fact that the hydro-

plane surfaces at the low side of the hull will be deeper in the water and have thereon a greater sustaining pressure than that exerted on the surfaces of greater inclination at the high side of the hull.

Page 3, lines 57 to 85, inclusive, sets forth the advantages of the concave V form as follows:

> The making of the lateral parts of the hydroplane members of concave shape has the advantage of affording greater sustaining power than is obtained by the use of V-shaped members having flat lateral surfaces. A hull of convex shape tends to displace the water radially, and is suitable for displacement boats, but the object of the hydroplane member is to lift the boat above the water and this result is better attained by a concave surface, because the pressure of all parts of such concave surface is exerted on the water in lines at right angles to the surface, and as these lines are, generally speaking, radial to the center point of a circular arc corresponding with the curvature of the concave surface, it follows that the pressure of the inner and outer parts of the concave hydroplane members on the water will tend to prevent outward displacement of the water, and thereby afford a more solid body of water to sustain the boat.
>
> The concave form of the hydroplane member also promotes stability, because giving a self-righting action due to the greater sustaining pressure of the water confined beneath the concave lateral part of the hydroplane member which is deepest in the water at the low side of the boat.

9. The claims in suit are as follows:

> 1. A hydroplane boat provided at each side of the center line of the bottom of its hull with a series of hydroplane members which form the flotation surface of the said bottom and are arranged in stepped relation and inclined laterally and downwardly toward the keel line of the boat.
>
> 2. A hydroplane boat having a pointed bow and provided at each side of the center line of the bottom of its hull with a series of hydroplane members which form the flotation surface of said bottom and which are arranged in stepped relation, are inclined laterally and downwardly toward the keel line and are of gradually increasing width from the bow toward the widest part of the boat.
>
> * * * * *

5. A hydroplane boat, provided at each side of its bottom with a series of hydroplane members which are arranged in stepped relation, are inclined laterally and downwardly toward the keel line and the downwardly facing surfaces of which are transversely concaved.

6. A hydroplane boat having a pointed bow and provided at each side of its bottom with a series of hydroplane members which are arranged in stepped relation, are inclined laterally and downwardly toward the keel line and are transversely concaved.

10. The claims in suit are directed to the lateral or crosswise inclination and the stepped relation of a plurality of hydroplane surfaces, and are not limited solely to a boat construction as shown in the first embodiment of the patent (Figs. 1 to 5) which has the descending keel line throughout the entire length of the boat in contradistinction to the second embodiment (Figs. 6 to 9) in which the keel line only descends to a point somewhat aft of the center section of the hull.

Claim 3, not here in issue, is quoted by way of comparison:

3. A hydroplane boat having a pointed bow and provided at each side of the center line of the bottom of its hull with a series of hydroplane members which form the flotation surface of said bottom, which are arranged in stepped relation, are inclined laterally and downwardly toward the keel line and are of gradually increasing width from the bow toward the widest part, and are, at said keel line, at gradually increasing distances below the side margins of the bottom from the bow toward the stern of the boat.

11. A certified copy of the file wrapper showing the history of the patent application which materialized into the first Fauber patent in suit (#971,029), plaintiff's exhibit 5, is by reference made a part of this finding.

Of the list of prior art patents introduced in evidence by the defendant (see finding 17), the file wrapper shows that the following were cited by, considered by, or called to the attention of the Patent Office during the prosecution of the application:

U. S. Patent to Mills, #514,835 (defendant's exhibit 3c).

U. S. Patent to O'Brien, #509,672 (defendant's exhibit 3d).

U. S. Patent to Miller, #850,034 (defendant's exhibit 3e).

U. S. Patent to Hickey, #761,835 (defendant's exhibit 9).

U. S. Patent to Thompson, #904,464 (defendant's exhibit 10).

12. The second patent in suit #1,024,682 relates in general to a hydroplane boat with a bottom formed of a plurality or a series of hydroplane surfaces or members located at each side of the central or keel line. The said surfaces are inclined laterally down toward the keel and form a concave or hollow V-shaped cross section from chine to chine. The surfaces from fore to aft are arranged in stepped relationship.

In general, this patent relates to the same type of hull as is set forth and disclosed in the first patent in suit, which patent is specifically referred to by application number in the second patent.

The structure of the second patent differentiates from that of the first patent in two distinctive features. These features are—

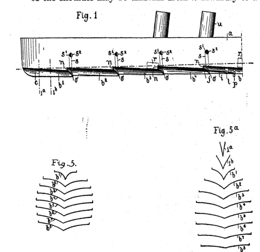
(1) Each of the two hydroplane members is arranged at opposite sides of the center line of the bottom and inclines laterally and downwardly toward the center line, each of the hydroplane members having its angle of rearward inclination at said center line less than angle of rearward inclination at its outer lateral margin. Stated in a more simple form this means that the V-shape of each of the hydroplane surfaces is warped or twisted so that an individual hydroplane surface becomes flatter fore to aft.

(2) With respect to any two hydroplane surfaces arranged one to the rear of the other, the hydroplane members of the rear hydroplane surface have a less degree of lateral or transverse inclination than the hydroplane members of the forward hydroplane surface; that is to say, each rear hydroplane surface has a flatter V form than the forward hydroplane surface.

Figures 1, 5 and 5a of the patent in suit, which disclose these features, are reproduced on the following page:

13. With respect to the steps, the patent suggests several forms of step or shoulder. The patentee describes these modifications in the following phraseology, beginning on page 1, line 97, to page 2, line 33:

However, I consider it preferable to have a certain depth of shoulder at the keel line adjacent to the rear end of each hydroplane member, to permit the entrance of air, and thereby to reduce the area subject to friction. It is further obvious that the height or depth of the shoulder at the rear end of each hydroplane member may be the same from its outer margin *n* inward toward the keel, or instead of gradually decreasing the depth of said shoulder from *n* toward the keel line, the depth of the shoulder may be uniform from *n* inwardly to a



Figures 1, 5, and 5a, U. S. Patent to Fauber, #1,024,682.

certain point, and from the latter be decreased toward the keel line. The said hydroplane members are, moreover, constructed so that, as can be seen from Fig. 5, the forward or front hydroplane presents in cross section oblique lateral faces arranged at an acute angle to each other and meeting at a sharp angle, so as to have a V-form; the apex pointing downwardly and the sides being concave.

I construct the shoulders at the rear ends of the several hydroplane members of substantially uniform height or vertical width and as the lateral margins of the hydroplane members are, as usual, flush with the sides of the hull, the width of said hydroplane members gradually increase from the bow toward the widest part of the boat. By reason of the tapered form of the forward part of the hull, the angle of lateral inclination of the bottom surfaces of the hydroplane members gradually decreases from the bow toward the stern so that the V-shape of the same, in cross section (as seen in Fig. 5), is gradually widened or flattened, whereby the advantages of a gradual displacement, as set forth in my above-cited application, are obtained, together with the additional advantage that, by reason of the front or forward hydroplane member or members being made of a sharp V-shape in cross-section, the pounding action on the water, particularly where rough water is encountered, is greatly diminished.

14. The claims in suit are as follows:

1. A hydroplane boat provided with a plurality of hydroplanes arranged in stepped relation and forming the flotation surface of its bottom, at least one of said hydroplanes consisting of two hydroplane members arranged at opposite sides of the center line of the bottom and inclined laterally and downwardly toward said center line; said hydroplane members having their angle of rearward inclination at said center line less than their angle of rearward inclination at their outward lateral margins.

2. A hydroplane boat provided with a plurality of hydroplanes arranged in stepped relation and forming the flotation surface of its bottom, at least one of said hydroplanes consisting of two hydroplane members arranged at opposite sides of the center line of the bottom and inclined laterally and downwardly toward said center line; said hydroplane members being transversely concaved and having their angle of rearward inclination at the center line less than their angle of rearward inclination at their outer lateral margins.

* * * * *

4. A hydroplane boat provided with two hydroplanes arranged one at the rear of the other, and in stepped relation and having their bottom surfaces at their forward ends continuous with the flotation surface of the hull, said hydroplanes each consisting of two hydroplane members arranged at opposite sides of the center

line of the bottom and inclined laterally and downwardly toward said center line; the said hydroplane members of the rearmost hydroplane having a less degree of lateral inclination than the hydroplane members of the forward hydroplane.

5. A hydroplane boat provided with two hydroplanes arranged one at the rear of the other and in stepped relation, and having their bottom surfaces at their forward ends continuous with the flotation surface of the hull; said hydroplanes each consisting of two hydroplane members, which are arranged at opposite sides of the center line of the bottom, are inclined laterally and downwardly toward said center line and are transversely concaved, and the said hydroplane members of the rearmost hydroplane having a less degree of lateral inclination than the hydroplane members of the forward hydroplane.

* * * * *

29. A hydroplane boat provided with at least two hydroplanes arranged in stepped relation and having their bottom surfaces at their forward ends continuous with the flotation surface of the portion of the hull forward of the same, at least one of said hydroplanes consisting of two hydroplane members arranged at opposite sides of the center line of the bottom and inclined laterally and downwardly toward said center line; said hydroplane members having their angle of rearward inclination at said center line less than their angle of rearward inclination at their outer lateral margins.

15. A certified copy of the file wrapper showing the history of the patent application which materialized into the second Fauber patent in suit (#1,024,682), plaintiff's exhibit 6, is by reference made a part of this finding.

Of the list of prior art patents introduced in evidence by the defendant (see finding 17), the file wrapper shows that the following were cited by, considered by, or called to the attention of the Patent Office during the prosecution of the application:

U. S. Patent to Miller, #850,034 (defendant's exhibit 3e).

British Patent to Dickie, #4868 of 1881 (defendant's exhibit 5a).

French Patent to Mouniee, #360,067 of 1906 (defendant's exhibit 5e).

French Patent to Fauber, #381,246 of 1907 (defendant's exhibit 13).

16. The filing date of the first patent in suit (#971,029) is September 10, 1908, and the filing date of the second patent in suit (#1,024,682) is September 13, 1909.

There is no satisfactory evidence to place the date of the Fauber inventions prior to the above-enumerated filing dates.

17. The prior art is exemplified by the following prior art patents and publications:

UNITED STATES PATENTS

No. 1,088,226 to Hewitt, deft.'s exhibit 3a.
No. 5,644 to Stevens, deft.'s exhibit 3b.
No. 514,835 to Mills, deft.'s exhibit 3c.
No. 509,672 to O'Brien, deft.'s exhibit 3d.
No. 850,034 to Miller, deft.'s exhibit 3e.
No. 857,317 to Timby, deft.'s exhibit 3f.
No. 272,621 to Bainbridge, deft.'s exhibit 3g.
No. 761,835 to Hickey, deft.'s exhibit 9.
No. 904,464 to Thompson, deft.'s exhibit 10.
No. 917,935 to Elniff, deft.'s exhibit 11.

FOREIGN PATENTS

BRITISH

No. 4,868 of 1881 to Dickie, deft.'s exhibit 5a.
No. 28,622 of 1897 to Baxter, deft.'s exhibit 5b.
No. 5,923 of 1904 to Thompson, deft.'s exhibit 5c.
No. 11,863 of 1905 to Bates, deft.'s exhibit 5d.

FRENCH

No. 360,067 to Mouniee, deft.'s exhibit 5e (translation thereof deft.'s exhibit 5e–1).

No. 4,895 add. to no. 344,484 to de Lambert, deft.'s exhibit 5f (translation thereof deft.'s exhibit 5f–1).

No. 369,550 to de Lambert, deft.'s exhibit 5g (translation thereof deft.'s exhibit 5g–1).

No. 377,390 to Société Antoinette, deft.'s exhibit 5h (translation thereof deft.'s exhibit 5h–1).

No. 377,070 to Bonnemaison, deft.'s exhibit 5i (translation thereof deft.'s exhibit 5i–1).

No. 381,246 to Fauber, deft.'s exhibit 13 (translation thereof deft.'s exhibit 13a).

SWISS

No. 37,839 to Borgel-Court, deft.'s exhibit 15 (translation thereof deft.'s exhibit 15a).

PUBLICATIONS

"Naval Science," Vol. 4, January, 1875, pages 37 to 51, incl., and pages 262 to 264, incl., defendant's exhibit 6a.

Several sheets taken from the "Transactions Society Naval Architects and Marine Engineers," Vol. 11, 1903, pages 44 and 45, and plates 12, 13, 21, and 22, defendant's exhibit 6b.

The publication "The Rudder," December, 1905, pages 647 to 650, incl., defendant's exhibit 6c.

The publication "The Motor Boat," September 25, 1906, Vol. 3, No. 18, pages 26 and 27, defendant's exhibit 6d.

The publication "The Rudder" of May, 1907, pages 500 to 505, incl., defendant's exhibit 6e.

The publication "The Rudder" of June, 1907, pages 553 to 558, incl., defendant's exhibit 6f.

The publication "The Motor Boat," May 25, 1907, Vol. 4, No. 19, page 24, defendant's exhibit 6g.

The publication "Scientific American Supplement No. 1595," July 28, 1906, pages 25552 to 25555, incl., defendant's exhibit 6h.

The publication "Scientific American," February 23, 1907, page 165, defendant's exhibit 6i.

The publication "Scientific American," June 15, 1907, page 495, defendant's exhibit 6j.

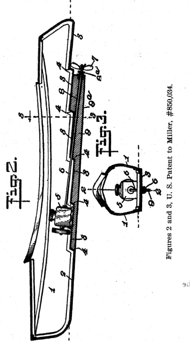
The publication "Scientific American Supplement No. 1641," June 15, 1907, pages 26289 and 26290, defendant's exhibit 6k.

These exhibits are by reference, as indicated, made a part of this finding.

For the purpose of consideration, the above prior art may be considered as broadly classifiable into (1) hydroplane hulls, and (2) hulls of the displacement type.

HYDROPLANE HULLS

18. (a) United States Patent to Miller, #850,034 (defendant's exhibit 3e), discloses a boat hull having a bottom



Figures 2 and 3, U. S. Patent to Miller, #850,034.

provided with a flat forward portion and a plurality of flat horizontal inclined planes and steps extending rearwardly. The boat hull is provided with a keel to give stability, and the patent specification describes as the essential feature of this hull the tendency to ride out of the water when moving at high speed, thereby decreasing the draft and causing the boat to ride upon the surface of the water instead of crowding its way through the water.

This disclosure is typical of the early art of transversely flat hydroplane boats with flat hydroplane surfaces on the bottom, and this patent was considered by the Patent Office in connection with the Fauber applications which matured into the two patents in suit.

(b) British Patent to Dickie, #4868 of 1881 (defendant's exhibit 5a).

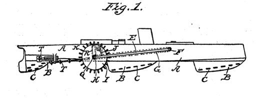
This patent discloses a boat of oblong or barge-shaped form having a bottom which is more or less flat in general contour, the purpose of this general design being to enable the boat to skim over the surface of the water. The bottom is formed of a series of inclined planes disposed longitudinally one behind the other which may present to the water either a flat or a slightly convex curved surface rising toward a scow-shaped bow. In one form, i. e., Fig. 5, the forward planes on either side of the keel are made slightly concave or hollow.

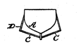
(c) British Patent to Thompson, #5923 of 1904 (defendant's exhibit 5c).
United States Patent to Thompson #904,464 (defendant's exhibit 10).

These patents disclose a series of thin metal plates or fins independent from the hull of the vessel and supported by means of struts and which do not form a portion of the flotation surface.

These plates are so mounted or attached to the hull as to form a series of rearwardly and downwardly inclined surfaces which function as hydroplane surfaces. As shown in Figs. 1 and 2 of the United States Patent, illustrated on the following page, these plates are also laterally and downwardly inclined toward the keel.

Figure 6 of the British patent is the same as Figure 2 of the United States patent, and Figure 1 of the United States patent is the same as Figure 1 of the British patent. The disclosures of the British patent and the United States patent are similar, and the United States patent was considered by the Patent Office during the prosecution of the application which materialized into the first patent in suit.





U. S. Patent to Thompson, #904,464.

(d) United States Patent to Hewitt, #1,088,266 (defendant's exhibits 3a and 4).

This patent discloses in Figure 1 a form of hull with a front section and a rear section placed at an angle. The bottom hull intended for water contact is flat and is intended to plane over the surface of the water. The specification in this respect refers to "the skipping of a flat stone skillfully thrown over the surface of the water." This patent also discloses flat planing surfaces independent of the hull and located in the water beneath the same.

There is no disclosure of either the step formation or types of V-bottom present in either of the Fauber patents.

19. The following patents and publications are also directed to hydroplane hull construction, and are merely cumulative to flat stepped hydroplane construction as ex-

emplified in the United States Patent to Miller, *supra*, which was considered by the Patent Office.

(a) U. S. Publication "The Rudder," May, 1907 (defendant's exhibit 6e).

This publication discloses a hydroplane boat provided with three flat rearwardly inclined hydroplane surfaces. The forward surface is predominantly flat except where it curves at the bow, and the two rear surfaces are flat throughout. In the drawings of the "Ricochet Nautilus" hydroplane boat, also disclosed in this publication, this disclosure differs from the one just described, only in that the two flat hydroplane surfaces are disclosed instead of three.

(b) U. S. Publication "The Motor Boat," 1906 (defendant's exhibit 6d).

This publication also discloses and refers to the Ricochet Nautilus. It further states that "the forward part is that of the ordinary boat or rather scow with a very blunt bow."

(c) U. S. Publication "Naval Science," Vol. 4, 1875 (defendant's exhibit 6a).

This publication mentions certain tests relative to rocket rams and shows a hull having a series of transversely flat rearwardly inclined hydroplane members with steps.

(d) French Patent to Mouniee, #360,067 (defendant's exhibit 5e).

This patent discloses a boat having a series of flat hydroplane surfaces rearwardly and downwardly inclined.

(e) Additional #4895 to French Patent to de Lambert (defendant's exhibit 5f).
French Patent to de Lambert, #369,550 (defendant's exhibit 5g).

The construction disclosed in these two patents shows a series of flat hydroplane members rearwardly and downwardly inclined, which hydroplane members form a part of the flotation surfaces of the boat.

(f) French Patent to Bonnemaison, #377,070 (defendant's exhibit 5i).

This patent discloses the same type of flat hydroplane stepped hull with a single step, as is shown in the Ricochet Nautilus.

(g) U. S. Publication, "The Rudder," 1907 (defendant's exhibit 6f).

This article discloses a hydroplane boat having two hydroplane surfaces separated by an amidships step. The bow is of rounded-scow shape and the forward surface where it turns up toward the bow is somewhat rounded or of a convex shape. The forward surface is predominantly flat and the after surface wholly so.

20. (a) French Patent to Société Antoinette, #377,390, September 5, 1907 (defendant's exhibit 5h).

This patent discloses the type of hull referred to in the specification as "a planing boat on the surface of the water without sensible penetration."

This hull, which is best shown in Figure 1 reproduced on the following page, comprises a forward portion having the form of an ordinary hull. This forward portion has a winding V-form from the pointed vertical bow to the rear portion thereof which is provided with a more or less expanded horizontal planing surface. The patent specification states that the parts *a d c* and *b d c* may be in the form of a helix (screw).

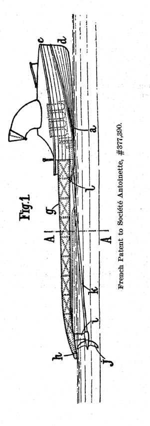
A second planing surface is provided in the rear and is connected with the forward planing surface by means of a rigid triangular frame.

This patent discloses a hydroplane hull, the forward planing surface of which is a winding V-type and is constituted by two hydroplane members arranged in opposite sides of the center line and inclined laterally and downwardly toward said center line.

(b) U. S. Publication "Scientific American Supplement," February 1907 (defendant's exhibit 6i).

This article illustrates and describes the same construction as that disclosed in the previous finding. The description in this article is as follows:

> The "Antoinette" speed boat is built on somewhat different lines. In front it carries a flat-bottomed boat



French Patent to Société Antoinette, #377,390.

of somewhat the usual form, while in the rear is attached a float forming a tail-piece which aids in obtaining the gliding action. The front boat carries the motor and passengers. From the motor a shaft runs to a propeller carried in the rear of the tail-piece. The latter (see diagram) has at the end a box-shaped piece whose under surface forms a plane, and the whole device gives a constant angle for the front boat in order to secure the gliding action. By using the front boat, the craft can stand bad weather and run even upon rough water, although its speed will be slower in this case. It will run on the hydroplane principle in smooth water.

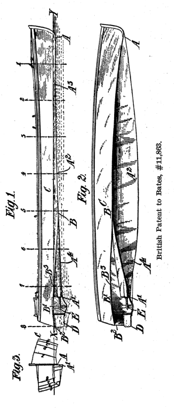
21. British Patent to Bates, #11,863 of 1905 (defendant's exhibit 5d).

The disclosure of this patent relates to what is termed shallow-draft or flat-bottom boats.

The three figures of this patent are reproduced on the following page.

The bottom of the boat comprises two separate portions, which are indicated in the figures as being curved both laterally and longitudinally. The forward portion of the boat which is curved longitudinally downward from A to B is of laterally concave curved section on each side of the keel as indicated by the stations 1, 2, 3, and 4 in the body plan of the boat shown in Figure 3. This forward portion terminates at the rear in a V-shaped riser or counter A4. The second bottom surface begins at this riser and extends to the stern, this latter portion being curved downwardly.

This patent discloses a hull structure which is intended to be partially supported on the surface of the water when underway by the reaction of the water on the curved bottom surfaces and has its forward supporting surface transversely concaved at each side of the center line of the boat.



British Patent to Bates, #11,863.

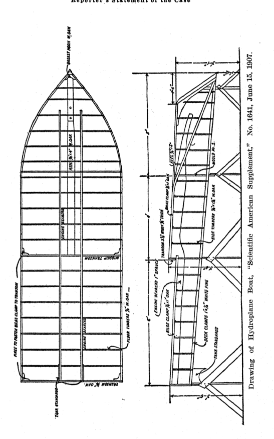
22. The publication "Scientific American Supplement" of June 15, 1907 (defendant's exhibit 6k), contains an illustrated article entitled "How To Build A Hydroplane Gliding Boat." The two illustrations accompanying the article are reproduced on following pages.

The hydroplane boat herein described consists of two hydroplanes (a front one and a rear one) arranged in stepped relation. The rear hydroplane is flat and approximately six feet in length. The forward hydroplane is flat at the step. Four feet forward of the step the bottom of the forward hydroplane has a slight V-inclination as indicated by Mold No. 1, and six feet forward of the step is a sharper V-inclination as indicated by Mold No. 2, which merges upwardly into a pointed bow nine feet forward of the step.

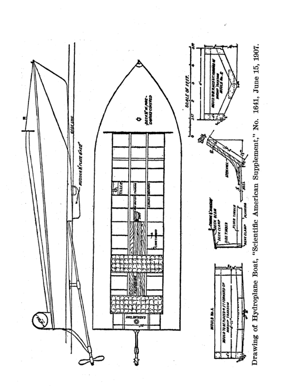
The forward hydroplane surface therefore consists of two hydroplane members arranged at opposite sides of the center line of the bottom inclined laterally and downwardly toward the center line. These hydroplane members are of increasing width from the bow toward the widest part of the boat.

The forward hydroplane surface may also be described as comprising a V-type hydroplane surface consisting of two hydroplane members each having a winding or twisted surface which extends from the pointed bow and terminates rearwardly in a flat bottom at the step.

From the chine lines illustrated in this article these hydroplane members have their angle of inclination at the center or keel line less than their angle rearward inclination at their outer lateral margin.



Drawing of Hydroplane Boat, "Scientific American Supplement," No. 1641, June 15, 1907.



Drawing of Hydroplane Boat, "Scientific American Supplement," No. 1641, June 15, 1907.

HULLS OF THE DISPLACEMENT TYPE

23. (a) United States Patent to O'Brien, #509,672 (defendant's exhibit 3d).

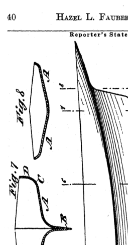
This patent discloses a boat hull of the pure displacement type having a sharp-edged bilge and keel, the hull being of transverse concave form between the bilge section and the keel. The degree of concavity preferably increases from the bow to the stern, the purpose as stated in the patent to render the craft less liable to upset and to prevent the boat from shipping water to any great extent; also to prevent drifting to leeward.

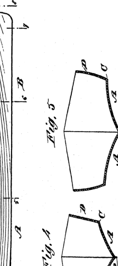
That the concave V-bottom is intended to contribute stability to power-driven hulls is evident from the following excerpt from the specification:

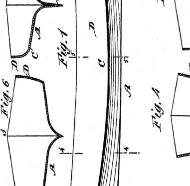
> It may be here remarked that when the hulls of steamers are constructed as above described they will roll but little even in a heavy sea.

This patent was considered by the Patent Office in connection with the application which matured into the first patent in suit.

Figures 1, 4, 5, 6, 7, and 8 of this patent are reproduced herewith:







Figures 1, 4, 5, 6, 7, and 8 of U. S. Patent to O'Brien, #509,672

(b) United States Patent to Stevens, #5644 (defendant's exhibit 3b).

This patent discloses a boat which is purely of the displacement type and has the form of usual displacement hull with the usual rounded bottom.

The bottom surface of the hull is covered with plates which the specification states are applied "somewhat resembling the scales of a fish or the shingles on the roof of a house—that is, a series of inclined planes forming a slight angle with the plane of the vessel's surface, and arranged in the direction of the length of the vessel, so that the summit of all the planes will be toward the stern."

Air is introduced through a series of tubes terminating at the surfaces so as to reduce frictional contact with the water.

(c) United States Patent to Timby, #857,317 (defendant's exhibit 3f).

This patent discloses a boat hull of the displacement type having a single offset on the hull which is termed wave impact receiving surface. The function of this offset is stated to be for the purpose of forcing the vessel ahead when the waves move in a forward direction and impinge on this receiving surface.

The patent does not teach those skilled in the art anything with reference to hydroplane surfaces or their actions or functionings.

(d) U. S. Publication, "The Scientific American Supplement," 1906 (defendant's exhibit 6h).

This article describes a racing motor launch of a sharp V-bow and a flat stern. The hull appears to be of the displacement type.

(e) U. S. Publication Transactions Society Naval Architects & Marine Engineers, 1903 (defendant's exhibit 6b).

This article refers to two launches, the *Dolphin* and the *Express*.

These boats are of the displacement type with no step, showing a winding V-bottom, starting at the bow, from

where the sections wind from a substantially vertical position to a horizontal position at the rear of the hull.

(f) British Patent to Baxter, #28,662 of 1897 (defendant's exhibit 5b).

This patent discloses a displacement hull, having various air discharge openings at various points under the waterline.

These air vents are provided with plates which function merely as shields or deflectors to direct the air rearwardly.

24. The aeroplane structures upon which the charge of infringement is predicated in this case, are as follows:

Loening Air Yacht S1 (War Department).

Loening Amphibian COA-1 (War Department).

Aeromarine Model 40 (Navy Department).

Models H-16 and H-16A Hull (Navy Department).

Type HS Hull (Navy Department).

Model F-5L Hull (Navy Department).

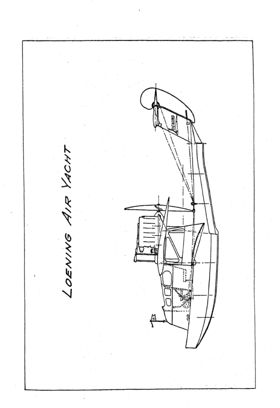
Model NB-1 Float (Navy Department).

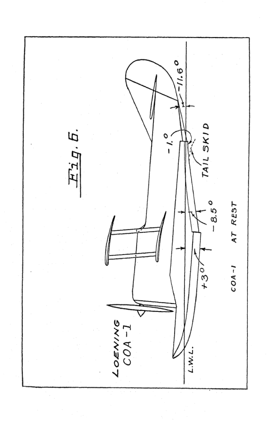
HDNW (Navy Wright) Pontoon (Navy Department).

The structural details of the above aeroplanes of interest in connection with these proceedings are plaintiff's exhibits 9, 10, 12, 14 and 31 to 38, inclusive, which are by reference made a part of this finding.

They are also shown in the set of drawings numbered from 1 to 18, inclusive, and which form a part of a stipulation entered into by the parties filed under date of April 22, 1939.

For convenience, typical illustrations of these aeroplane structures are shown herewith:


LOENING AIR YACHT
LOENING


Fig. 6.
LOENING
COA-1
L.W.L.
+3°
-8.5°
-1.°
-11.6°
TAIL SKID
COA-1 AT REST

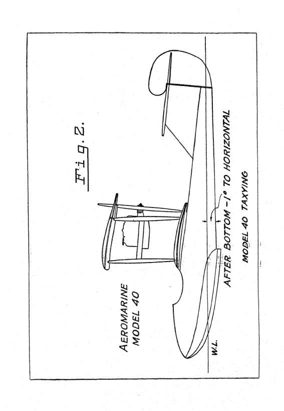
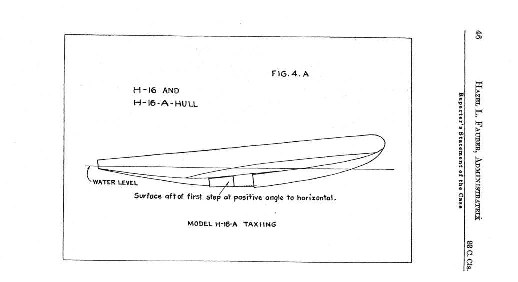
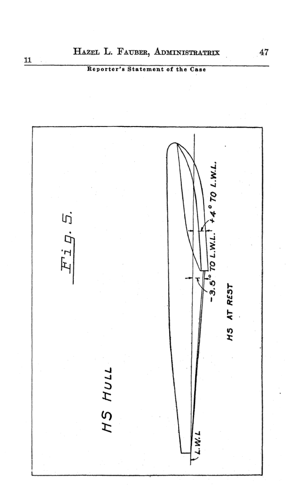
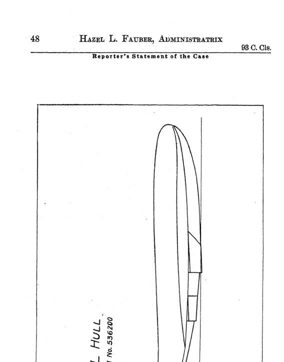

AEROMARINE
MODEL 40
W.L.
AFTER BOTTOM -1° TO HORIZONTAL
MODEL 40 TAXYING

Fig. 2.


FIG. 4. A
H-16 AND
H-16-A-HULL
WATER LEVEL
Surface aft of first step at positive angle to horizontal.
MODEL H-16-A TAXIING

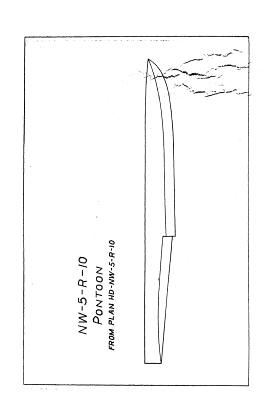

Fig. 5.
HS HULL
-3.5° TO L.W.L.
+4° TO L.W.L.
HS AT REST
L.W.L


F-5-L HULL
FROM PLAN No. 536200



NB-1 FLOAT

FROM PLAN No. 3863


NW-5-R-10
PONTOON
FROM PLAN HD-NW-5-R-10

25. Of the structures identified in the preceding finding—

(a) At least one each of the Loening Air Yacht S1 and the Loening Amphibian COA–1 was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and November 9, 1926, and between October 1921 and September 27, 1927.

(b) At least one of the structures identified as the Aeromarine Model 40 was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and September 27, 1927.

(c) At least one of the structures identified as Models H–16 and H–16A Hull was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates of April 30, 1912, and September 27, 1927.

(d) At least one of the structures identified as Type HS Hull was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and September 27, 1927, and between April 30, 1921, and September 27, 1927.

(e) At least one of the structures identified as Model F–5L Hull was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and September 27, 1927.

(f) At least one of the structures identified as Model NB–1 Float was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and September 27, 1927.

(g) At least one of the structures identified as HDNW (Navy Wright) Pontoon was manufactured for or by and used by defendant without license or permission from the patentee, and such manufacture and/or use occurred between the dates April 30, 1912, and September 27, 1927.

26. The petition in this case was filed April 26, 1932.

The first patent in suit (#971,029) expired September 27, 1927.

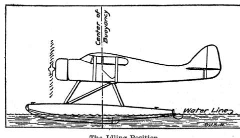
The second patent in suit (#1,024,682) expired April 30, 1929.

There is no satisfactory evidence of either use or manufacture of the structures referred to in findings 24 and 25 within the period beginning April 26, 1926 (six years prior to the filing of the petition) and ending April 30, 1929, but in view of the waiver by the Special Act of the defenses of lapse of time or the statute of limitations, the period of possible recovery under each patent is the term of the patent.

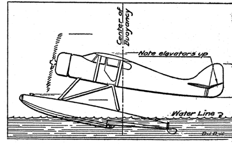
27. In the normal take-off of a seaplane with the conventional stepped hull, three characteristic attitudes are present. For convenience these attitudes may be referred to as (a) the idling position; (b) the nose-up position, and (c) running on the step.

Starting with the idling position in which the hull acts as a pure displacement boat or vessel, the normal procedure of the pilot is to open the engine throttle and to pull the controls back so that the elevators are turned up. As the ship begins to move the force of water on the forward portion of the float or hull tends to raise the nose of the aeroplane and the air reaction on the up-elevators tends to lower the stern.

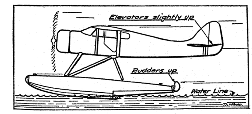
As the speed of the ship increases there is a hydroplane action on the bottom of the hull which tends to raise the after-portion of the ship. As the aeroplane increases its speed through the water the controls are returned to nearly neutral with a slight back pressure so that the elevators are slightly up. The combined air and water reaction then causes the ship to rise so that it runs on the step. When in this position the aft end of the hull is out of the water and the water friction is reduced to a minimum and the aeroplane speed then increases to a point where aerodynamic reaction on the wings is obtained sufficient to lift the aeroplane into the air. These three positions are shown in the set of illustrations of a conventional seaplane reproduced herewith:



The Idling Position.



The "Maximum Nose-Up" Position.



Running on the Step.

28. During the take-off run and prior to running on the step, the attitude or nose-up position of the plane is under the control of the pilot by means of the elevators, and therefore the extent of the hydroplaning action and this attitude of the hull bottom depends somewhat upon the manipulation of the controls by the pilot. However, a conventional seaplane will go through the nose-up position without any manipulation of the elevators by the pilot. A seaplane may be placed on the step without the nose rising to such a degree that the rear portion of the hull has a positive angle to the planing of the water. In such a procedure hydroplane action on the rear portion of the hull aft of the step still occurs due to an inverted waterfall from the forward portion of the hull which impinges on that portion of the hull aft of the step. However, a positive angle is invariably attained by the rear portion of the hull in the normal operation of a conventional seaplane.

Conventional procedure demands a minimum length of take-off travel and to obtain this it is necessary and essential that a maximum hydroplaning action be obtained in order to lift the hull onto the step. This is obtained by the natural action of the hull, which may be assisted by the controls, whereby the hull assumes a maximum nose-up position.

29. In each of the defendant's structures, illustrations of which are set forth in finding 24, prior to going on the step there exists the capability of a dynamic lifting reaction or hydroplaning effect of the water upon the lower surfaces of the hull. The extent to which this effect may be utilized during the take-off operation is under the control of the pilot, although the seaplane when in proper aerodynamic trim will take-off of itself without any manipulation of the elevators by the pilot.

30. The hulls of the Loening COA-1 and the Air Yacht are substantially the same, the air yacht being a seaplane and the COA-1 an amphibian.

In each instance the hull has a pointed bow and a bottom of V cross section, the bottom surfaces inclining laterally and downwardly toward the keel line. The bottom consists

of a bow surface, an intermediate surface, and a stern surface, each of these surfaces being separated by a step.

With a normal load at rest in the water, the bow surface has a positive or downward angle toward the stern and is downwardly and rearwardly inclined; the intermediate surface has a negative angle and is upwardly and rearwardly inclined, the after portion of this surface being eased off somewhat toward the horizontal, and the stern surface has a more pronounced negative angle than the intermediate surface.

The transverse angles of Vs of the bow and intermediate surfaces are all substantially similar and are illustrated in Drawing #3 forming a part of the stipulation filed April 22, 1939. As herein shown, they are straight and are not transversely concaved.

The terminology of claims 1 and 2 of the first patent in suit (see finding 9) is applicable to this structure.

31. The hull of the Aeromarine Model 40 has a pointed bow and a bottom of a V cross section, the bottom consisting of a bow surface and an after surface separated by a step. With a normal load and at rest in the water, the bow surface has a positive angle to the horizontal, and the aft surface has a negative angle, a longitudinal dihedral being present.

The V of the forward surface gradually becomes flatter aft toward the step and the V of the after surface is of a uniform angle throughout, being somewhat flatter than the V of the forward surface. As to the forward surface, there is a greater fore and aft angle at the outer margins than that at the keel or center line.

No concavity is present in the V surfaces.

The terminology of claims 1 and 2 of the first patent in suit (see finding 9) is applicable to this structure.

The terminology of claims 1, 4, and 29 of the second patent in suit (see finding 14) is applicable to this structure.

32. The hulls of the Models H-16, H-16A, and F-5L are substantially identical. These hulls have a broad but pointed bow and a bottom of V cross section with longitudinal dihedral, the bottom consisting of a bow surface, an inter-

mediate surface, and a stern surface, each separated by steps. The steps are formed by applied plates forming the after portions of the bow and the intermediate surfaces. These applied plates are open at the rear, and the surfaces formed thereby therefore do not form a part of the flotation surface.

The transverse angles or V's of the bow and intermediate surfaces are illustrated in Drawing #10, forming a part of the stipulation filed April 22, 1939. As shown, with the exception of the forward section of the bow surface, the V's are straight and are approximately at the same angle throughout the hull bottom. The forward portion of the bow is slightly concave.

As to the forward section, the angles at the outer margins and at the center or keel line are practically the same.

Inasmuch as claims 1 and 2 of the first patent in suit are limited to a series of hydroplane members which "form the flotation surface of the said bottom" the terminology of these claims does not apply to these structures.

Claims 5 and 6 of the first patent in suit are limited to a "*series* of hydroplane members * * * *which are transversely concave*," and the terminology of these claims does not apply to these structures.

Claims 4 and 5 are limited to hydroplane surfaces with the rearmost hydroplane having a less degree of longitudinal inclination than the forward hydroplane, and the terminology thereof therefore does not apply to these structures.

Claim 29 of the second patent in suit is limited to hydroplane members having their angle of rearward inclination at the center line less than their angle of rearward inclination at their latter outer margins, and the terminology of this claim is therefore not applicable to these structures.

None of the claims in issue is applicable to these structures.

33. The hull of the HS Type has a pointed bow and a bottom consisting of forward and after surfaces separated by a step and having a longitudinal dihedral. The forward surface has a concave V, while the rear or after surface is a flat or straight V.

In the forward surface which is concave, as shown in Drawing #12 forming a part of the stipulation filed April 22, 1939, the V flattens toward the step so that the forward surface has a greater angularity in the fore and aft direction at the margins than at the keel. The V of the after surface is flatter than the V in the forward surface.

The terminology of claims 1 and 2 of the first patent in suit is applicable to this structure.

Claims 5 and 6 of the first patent in suit do not apply as they specify a *series of hydroplane members*, the downwardly facing surfaces of *which are transversely concave*, and such a series of concave surfaces is not present in this structure.

The terminology of claims 1, 2, 4, and 29 of the second patent in suit is applicable to this structure.

The terminology of claim 5 of the second patent in suit does not apply, in that it is directed to two hydroplane surfaces, each of which consists of two hydroplane members which are transversely concaved.

34. The hull of the NB–1 Float has a pointed bow and a bottom of V section, the bottom consisting of a forward surface and an after surface separated by a step and having a longitudinal dihedral. The V section of both the fore and aft surfaces is straight, as indicated in Drawing #16 forming a part of the stipulation filed April 22, 1939.

The V section of the forward surface is more pronounced than the V section of the after surface and flattens toward the step.

The terminology of claims 1 and 2 of the first patent in suit is applicable to this structure.

The terminology of claims 1, 4, and 29 of the second patent in suit is applicable to this structure.

35. The hull of the HDNW (Navy Wright) Pontoon has a broad or pointed bow and a bottom of V section, the bottom consisting of forward and after surfaces separated by a step and having a longitudinal dihedral. The transverse angles or Vs of the two surfaces are the same and the Vs are straight, no concavity existing.

The body section of this pontoon is shown in Drawing #18 forming a part of the stipulation filed April 22, 1939.

The terminology of claims 1 and 2 of the first patent in suit is applicable to this structure.

36. The prior art considered in findings 18–25, *supra*, shows that those skilled in the art of boat and hull construction were familiar with and had knowledge of the following at the time the Fauber inventions, as expressed by the claims in suit, were made—

(a) Hydroplane hulls comprising a series of or a plurality of transversely flat hydroplane surfaces rearwardly and downwardly inclined in conjunction with a series of steps, i. e., the conventional flat-stepped hydroplane hull (findings 18 and 19).

(b) Hydroplane hulls comprising a series of or a plurality of hydroplane surfaces arranged in stepped relation and inclined laterally and downwardly toward the keel line of the boat (finding 18c).

(c) Hydroplane boats having a pointed bow with a series of hydroplane members arranged in stepped relation and forming the flotation surface of its bottom with one of said hydroplanes (the forward one) consisting of two hydroplane members arranged at opposite sides of the center line of the bottom and inclined laterally and downwardly toward the center line, these hydroplane members having their angle of rearward inclination at the center line or keel line less than their angle of rearward inclination at their outer lateral margins, the hydroplane members being of gradual increasing width from the bow toward the widest part of the boat (finding 22).

(d) A hydroplane boat with a pointed bow, the forward planing surface of which is of a winding V type (finding 20).

(e) The construction of a hull having a transversely concaved form between the bilge section and the keel. This is exemplified in connection with hulls of the displacement type in finding 23a, and in connection with hydroplane surfaces in finding 21.

37. The most pertinent prior art disclosure is that contained in the Scientific American Supplement of June 15, 1907, set forth in finding 22 (see also finding 36c).

The construction of the hydroplane boat therein described is of such a character that claims 1 and 29 of the second patent in suit are readable thereon and these claims are therefore invalid.

38. Claim 2 of the second patent in suit is directed to the same subject matter as claim 1 thereof, with the exception that it defines the hydroplane members as *"being transversely concaved."*

Such transverse concavity was known to those skilled in the art, both in connection with hulls of the displacement type and with hydroplane surfaces (finding 36e), and it would merely involve the use of mechanical skill to use a concave V surface in the hydroplane boat described in the Scientific American Supplement article, *supra* (finding 22), instead of the straight V surface therein disclosed. This claim is invalid.

39. Claims 4 and 5 of the second patent in suit are limited or detail claims directed to two hydroplanes in step formation, the hydroplanes each comprising two members arranged in opposite sides of the center line at the bottom and inclined laterally and downwardly toward said center line.

The detail limitation set forth in these claims has reference to the angular relationship existing between the hydroplane surfaces and the claims specify that the hydroplane members of the rearmost hydroplane have a less degree of lateral inclination than the forward hydroplane.

Claim 5 is still further limited in that it specifies that the hydroplane members are transversely concave.

No suggestion is found in any of the prior art of a V-type bottom surface stepped hydroplane construction in which the angular inclination of the rear V-shaped hydroplane is less than that of the forward hydroplane. These claims are therefore valid.

Claim 4 is readable upon the following Government structures: Aeromarine Model 40 (finding 31); HS Type (finding 33), and NB-1 Float (finding 34).

40. The disclosure in the Scientific American Supplement article (finding 22) is directed to a hydroplane hull having a plurality of hydroplane surfaces, the forward hydro-

plane surface of which is inclined laterally and downwardly toward the keel line, forming what may be termed a V-shaped surface, and the second or rear surface of which is flat.

The use of a V-shaped hydroplane surface forming a portion of the flotation surface of the bottom is also disclosed in the French patent to Société Antoinette (finding 20a).

A plurality of V-shaped hydroplane surfaces separate from the flotation surface of the hull is shown in the British and United States patents to Thompson (finding 18c).

In view of these prior disclosures, it would require but mechanical skill to substitute for the flat after hydroplane surface in the Scientific American Supplement article a V-shaped surface.

Claims 1 and 2 of the first patent in suit differ from the disclosure in the Scientific American Supplement article only in that they specify *a series of* V-shaped hydroplane members. To provide a series or a plurality of V-shaped hydroplane members instead of one would require only the use of mechanical skill, and these claims are therefore invalid.

41. A hydroplane boat having a plurality or series of hydroplane members, which are arranged in stepped relationship and are inclined laterally and downwardly toward the keel line, is shown in the British and United States patents to Thompson (finding 18c).

Claims 5 and 6 of the first patent in suit differ from this disclosure only in that they specify that the downwardly facing surfaces or the V-shaped surfaces are transversely concave.

Concaved hydroplane surfaces are old in the art as shown in Fig. 3 of the British patent to Bates (finding 21).

To make the V-shaped surfaces of the British and United States patents to Thompson concave instead of straight would require but mechanical skill, and claims 5 and 6 of the first patent in suit are therefore invalid.

42. Claims 1, 2, 5, and 6 of the first Fauber patent in suit, #971,029, are invalid.

Claims 4 and 5 of the second patent in suit are valid. The terminology of claim 4 thereof is applicable to the

Government structures known as the Aeromarine Model 40, HS type hull, and NB-1 float, and this claim has been infringed by the defendant by the manufacture and use of those structures. The terminology of claim 5 is not applicable to any of the Government structures alleged to infringe, and this claim has not been infringed.

The court decided as a conclusion of law that Claims 1, 2, 5, and 6 of the plaintiff's first patent, 971029, and Claims 1, 2, and 29 of plaintiff's second patent, 1024682, are invalid; that Claim 4 of plaintiff's second patent is valid and has been infringed by the United States; that Claim 5 of the second patent is valid but has not been infringed; and that plaintiff is entitled to compensation for the unauthorized use by the United States of the invention disclosed in Claim 4 of plaintiff's patent 1024682 under the act of June 25, 1910, 36 Stat. 851, as amended by the act of July 1, 1918, 40 Stat. 705 and section 155 of the Judicial Code.

LITTLETON, *Judge*, delivered the opinion of the court:

By certain amended petitions and a supplemental bill of particulars filed subsequent to the filing of the original petition there is placed in issue Claims 1, 2, 5, and 6 of patent 971029, hereinafter sometimes referred to as the first patent, and Claims 1, 2, 4, 5, and 29 of patent 1024682, hereinafter sometimes referred to as the second patent. The first patent was for a "Hydroplane Boat" and the second patent for "Construction of Boats and Ships". The inventor, William H. Fauber, to whom the patents were issued, died July 29, 1928, and the plaintiff, his widow, is the duly appointed and acting administratrix of his estate. The patents in suit expired September 27, 1927, and April 30, 1929, respectively, less than six years prior to the filing of the original petition on April 26, 1932. The main questions now before the court for consideration are (1) whether all or any of the claims of the patents in suit are valid and, if so, whether those that are valid have been infringed by the defendant's structures which plaintiff alleges embody the inventions. Certain other questions raised by the defendant relating to the right of plaintiff to maintain this suit are (1) that the estate of Fauber has no right, title, or interest

in any of the claims of the patents in suit because of a prior transfer and assignment of both patents by the decedent; (2) that the patents are for hydroplane boats constantly immersed in water, and that the manufacture and use of a hull for alighting upon and ascending from the water may not be included in the invention of the patentee; and (3) that the statute of limitation bars recovery and requires that the petition be dismissed for the reason that the evidence submitted does not establish any manufacture or use by the defendant of any of the alleged infringement structures within a period of six years prior to the filing of the original petition. The last three questions will be disposed of first.

The assignment executed by patentee Fauber on June 27, 1923, of certain interests in the patents in suit to Gar Wood, Inc., upon which counsel for defendant rely in support of their contention that the estate is not entitled to maintain this suit is set forth in Finding 6. Under this instrument patentee Fauber, on June 27, 1923, made a limited transfer of interest in the patents here in issue to Gar Wood, Inc., of Detroit, but counsel for defendant contend that under the language of this assignment Fauber divested himself of his entire right, title, and interest in and to each of the patents in suit and all rights thereunder, together with the right to sue for and recover profits and damages for past or future infringement of any or all of the claims of said patents; that every right granted to Fauber by the Patent Office, including the right to prohibit others, passed under the assignment to Gar Wood and that the effect of the assignment was to vest full title in Gar Wood necessitating the bringing of this suit in the name of that corporation as the holder of title to the two patents in suit. We cannot agree. The language of the instrument and the evidence of record with reference to the circumstances and conditions under which the assignment was made show that Fauber gave to Gar Wood all rights under the patents only "insofar as they relate to the exclusive use thereof in connection with the manufacture, use, and sale of hydroplane boats or the like, primarily designed not to leave the surface of the water and not including toy and model boats too small to carry one person, together with the right to sue for and recover

profits and damages for past or future infringement of any one or all of said patents." The rights to exclusive use thus granted were clearly limited and by the plain language of the instrument there was reserved to Fauber all rights under the patents pertaining to hydroplane boats or the like, primarily designed to leave the surface of the water—such boats, of course, being the hulls or floats of the hydroaeroplanes. Fauber thus gave Gar Wood exclusive rights in a limited field and did not part with title to the patents. *Gamewell Fire-Alarm Telegraph Co.* v. *City of Brooklyn*, 14 Fed. 255. In that case the court said:

> The right transferred was not an undivided part of an entire patent, or an undivided part of the entire interest of the patentee in specified territory, but was a segregated right for a particular employment of the invention. The complainant was, therefore, merely a licensee, within the rule established in *Gayler* v. *Wilder*, 10 How. 477; the right transferred to him being less than that of the entire and unqualified monopoly.

While an exclusive licensee as to one field of use, the assignee Gar Wood was a non-exclusive licensee under the patents, and, as such, was not even a necessary party plaintiff since its interests are not affected by the claim made in the present suit which involves only hydroplane boats primarily designed to leave the water. As was said by the court in *Mallory & Co., Inc.* v. *Automotive Manufacturers' Outlet, Inc.* 45 Fed. (2d) 810—

> Even though one be an exclusive licensee if the license is limited to a particular field, territorially or commercially, and is not claimed to be invaded, such licensee is not affected and no good purpose would be served by forcing it to become a party plaintiff.

Inasmuch as the present claim relates only to the defendant's use of Fauber's invention on the hulls and pontoons of hydroaeroplanes, it follows that suit upon the claim presented was properly brought in the name of the administratrix of the estate of Fauber.

We can find no merit in defendant's next contention that the pontoons or hulls of the alleged infringing structures are not hydroplane boats because they are provided with

wings. When defendant's seaplanes are on the water, their pontoons or hulls, having hydroplaning surfaces, are, we think, undeniably hydroplane boats and are within the inventions specified in the claims of the patent in suit; as such hydroplane boats, they are subject to all the laws pertaining to boats, and, when in the air, the pontoons, or hulls, are still boats although not functioning as such. The date at which the inventor Fauber first knew of the utility of his hydroplane boats as parts of a hydroaeroplane is unknown, but the evidence clearly shows that he had this knowledge as early as 1912; but whether he knew of it at all is immaterial for he was entitled to all the uses of his invention. *Diamond Rubber Company of New York* v. *Consolidated Rubber Tire Company*, 220 U. S. 428, 435. In that case the court said:

> A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor. And how can it take from his merit that he may not know all of the forces which he has brought into operation?

In view of the facts and circumstances disclosed by the record, we cannot sustain the next contention of the defendant that the petition should be dismissed for failure of plaintiff to make out a *prima facie* case by showing manufacture or use of one or more of the defendant's alleged infringing structures within a period of six years from April 26, 1926, to April 26, 1932, the last date being the date on which the original petition was filed. Section 156 of the Judicial Code, U. S. Code, Title 28, sec. 262, p. 1263, provided in part that—

> Every claim against the United States cognizable by the Court of Claims, shall be forever barred unless the petition setting forth a statement thereof is filed in the court * * *, as provided by law, within six years after the claim first accrues: * * *.

Standing alone, the provisions of this section, being a part of the Act of March 3, 1911, 36 Stat. 1135, 1139, would limit plaintiff's right to recover as to the first patent to a period

of one year and five months from April 26, 1926, to September 27, 1927, the last date being the date of expiration of this patent; and as to the second patent, the right of recovery would be limited to a period of three years from April 26, 1926, to April 30, 1929, the last date being the expiration date of this patent. We are of opinion, however, that the provisions of the special jurisdictional act of March 3, 1931, quoted in finding 2, effectively waived any statute of limitation or lapse of time which might otherwise be a bar to the right of the administratrix of the estate of Fauber to maintain suit and recover compensation, or either, for the unauthorized use at any time by the defendant of either of the Fauber patents. This interpretation of the jurisdictional act is based upon the reasons for its enactment as disclosed by the facts before the Congressional Committees, and of record here, and the facts and reasons set forth by those committees recommending the enactment of the statute. Identical bills from which S. 3230 became the jurisdictional act of March 3, 1931, 46 Stat. 2134 (Part 2), were introduced in the House and Senate prior to January 23, 1930. At the time these bills were introduced, and on March 3, 1931, when the jurisdictional act in question was approved, plaintiff had a right without any special act to institute suit in this court under the act of June 25, 1910, as amended by the act of June 1, 1918, U. S. Code, Title 28, sec. 68, for the recovery of compensation for the manufacture or use, or either manufacture or use, by the defendant of any structures infringing all or any of the claims of either, or both, of the patents within a period of six years prior to the filing of such petition. At that time the limitation period specified in section 156 of the Judicial Code, *supra*, would have reached back to March 1925, which was a date two years and six months prior to the expiration date of the first patent on September 27, 1927, and four years and nearly two months prior to the expiration date of the second patent on April 30, 1929. In the report of the committee of the judiciary, House Report No. 2450, 71st Congress, 3d sess., which was adopted by the Senate Committee on Claims recommending the passage of the jurisdictional

act which was subsequently enacted and approved on March 3, 1931, it was stated in part as follows:

> The following facts appear to be conceded: * * * 2. That the Navy Department, some time prior to the late war, adopted and made use, on their hydroplanes, of the hull covered by these inventions. 3. That they have continued to use this patented hull ever since, are still using the same, and in letters dating back as far as 1917, the Navy Department admitted the use thereof, suggested to him [Fauber] that he had a claim and that he should press the same in the Court of Claims. 4. That the Government never made settlement with Mr. Fauber, nor with his estate, for the use of this patented article. 5. That for some reason Mr. Fauber neglected to present his claim to the Court of Claims and it is now barred by the statute of limitations and can not be presented without the adoption of legislation as embodied in this bill.
>
> It is the opinion of your committee that the late Mr. Fauber, being the owner of this patented article and it being conceded that the Government has appropriated and is using the same, his heirs should be permitted to bring this claim before the Court of Claims for adjudication, notwithstanding the bar by the statutes.

The committee then proceeded to set forth in the reports the following:

A letter of August 8, 1917, to the decedent, Fauber, from the Naval Consulting Board, in which Fauber was advised in part that—

> The law provides that when the Government so uses any patents, the owner may make claim upon the Government for royalty in the Court of Claims, but that does not debar the Government from making arrangements in advance with the owners of the patents if the Government considers it expedient.

A letter of August 22, 1917, from the chairman of the Primary Examiners' Advisory Committee of the Patent Office advising Fauber that—

> Your remedy is by suit in the United States Court of Claims on your patents unless you have made, or enter into, an agreement with the War or Navy Departments.

A letter of March 27, 1930, from the Acting Secretary of the Navy to the Chairman of the Senate Committee on Claims stating in part that—

> The records of the Navy Department show that Mr. Fauber first presented his claim to the Navy Department on August 1, 1917; that from that date until March, 1928, Mr. Fauber frequently advanced his claim to the Navy Department or to various bureaus thereof.
>
> With regard to the Fauber claim, the Navy Department, from the outset, has been of the opinion that the questions of infringement and validity of the Fauber patents were so controversial in nature as to require an adjudication by a court of competent jurisdiction before an expenditure of Government funds on the basis of such patents could be justified. As a result of this position on the part of the Navy Department, Mr. Fauber was repeatedly given to understand that he could not look to the Secretary of the Navy for a settlement of his claim.
>
> It is noted that the proposed legislation does not go to the merits of the claim but merely to the removal of the Statute of Limitations as a bar to an action in the Court of Claims.
>
> Nothing in the records of the Navy Department is pertinent to the question as to whether or not Mr. Fauber's delay in resorting to the Court of Claims was excusable.

Also, a letter of February 15, 1940, from the Secretary of War to the Chairman of the Senate Committee on Claims stating in part as follows:

> The existing law that may be said to be affected by the enactment of the foregoing bill is section 156 of the Judicial Code of the United States, which requires action to be commenced in the Court of Claims within six years after the claim first accrues. The purpose of the foregoing bill is clearly to waive the operation of this statute of limitations with respect to the instant claim.
>
> Undoubtedly the merit of a bill, such as the foregoing, is primarily to be determined by a study of the facts at hand, showing the degree of diligence with which the claimant has endeavored to protect his interest since the claim first arose. As has already been stated, the statute of limitations gives every claimant six years in which to bring a suit against the United

States in the Court of Claims. This must be taken to be ample time, and in the ordinary case a claimant would not be entitled to an extension thereof unless the facts show that he has been prevented from bringing his suit within the period prescribed by the statute, for reasons beyond his control. In other words, the facts should show the claimant to be free from laches.

* * * * *

Mr. William H. Fauber first presented his claim to the War Department in a letter dated April 26, 1926, and it is believed that he addressed a similar letter to the Secretary of the Navy on the same date. The claim was carefully studied in the office of the Judge Advocate General and in the office of the Chief of Air Corps, and was formerly denied by the War Department in a letter to Mr. Fauber under date of December 2, 1926. The specific ground for denial was that the War Department was without legal authority to make a settlement of the claim for unliquidated damages, and Mr. Fauber was advised that his remedy, if any, was by action in the Court of Claims.

It would seem from the above facts that there was laches on the part of Mr. Fauber in waiting until 1926 to make his formal claims against the Government. It can be said in his favor, however, that from the time he made his formal claim Mr. Fauber showed due diligence at all times in his efforts to accomplish a settlement by negotiation. He also submitted his inventions to the Patents and Design Board, created by section 10 (r) of the act of July 2, 1926. His application for an award from this board, however, was denied.

Another question which seems to present itself is whether or not the enactment of the proposed bill is necessary in order to permit the claimant to bring an action in the Court of Claims. I am advised that the claimant could bring such a suit without the aid of Congress and could recover damages for any infringements of the patents concerned that may have occurred within the past six years. Of course, two of these patents expired in 1927 and 1929, respectively, and no recovery as to them could be had for uses occurring after their expiration dates. It is realized that the recovery in such a suit, assuming that infringement could be proved, would be relatively small, as it would not extend to the war-time procurements. This no doubt is the reason why the claimant has appealed to Congress for the enactment of the proposed bill.

> Although the history of this case, as outlined above, does not seem to show any reasons for extending the period established by the statute of limitations, I am mindful of the fact that the present claimant, in whose interest the bill has been introduced, has not been guilty of laches. I also feel that any departmental recommendation which might serve as a guide to your committee in its deliberations upon the bill should, in the instant case, come from the Navy Department. For these reasons, I feel constrained to express no opinion as to the enactment of the proposed legislation.

In view of these and other similar facts which were before the committees and were included in their reports recommending the passage of the bill in the form in which it was finally enacted, we are of opinion that the intent and purpose of Congress when conferring jurisdiction upon this court to hear, examine, and adjudicate and render judgment on the claim of plaintiff "notwithstanding the lapse of time or the statute of limitations" was to waive and remove any bar under section 156 of the Judicial Code which would otherwise operate as a limitation during the period for which plaintiff could recover compensation. The period of limitation specified in sec. 156 of the Judicial Code is a limitation both on the right to institute suit and on the period prior to suit during which recovery may be had. In these circumstances and in view of the facts disclosed by the record, we would not be justified in assuming, in the absence of language clearly indicating such intent, that Congress intended only to waive the limitation on the right to institute a suit upon the patents and not to waive the limitation on the period for which recovery might be had. As shown above, the attention of the Congressional Committees which considered and recommended the passage of the jurisdictional act was called to the fact that Fauber had presented his claim for alleged unauthorized use of the patents as early as August 1917 and that the special jurisdictional act was not necessary in order to enable the administratrix to institute a suit in this court upon the patents since such patents did not expire until 1927 and 1929, respectively, but that any recovery on them could be had for uses occurring within a period of six years prior to the filing of the peti-

tion, and without a waiver of limitation any period for recovery would be relatively small. We are therefore of opinion, and so hold, that under the provisions of the jurisdictional act plaintiff is not limited in the right of recovery for such infringement as may be established to a period of six years prior to the filing of the original petition, and that she may recover any compensation to which she shows herself to be entitled for any use by the defendant of the Fauber inventions at any time during the life of the patents.

The next two questions, which will be considered together, are whether any or all of the four claims of the first patent in suit (finding 9) and the five claims of the second patent in suit (finding 14) are valid and, if so, whether any or all of such claims have been infringed by any or all of the alleged infringing structures of the defendant which are described and illustrated in findings 24 to 35. The question of accounting as to the amount of recovery, if any, is reserved until after the determination of the question of validity and infringement.

Both patents relate to the hull construction of what is known as "Hydroplane Boats". A hydroplane boat is defined as one which is so constructed as to receive support when in motion from the dynamic reaction of the water upon surfaces, technically referred to as "hydroplanes," the dynamic reaction of the water acting upon these surfaces to raise the hull partly out of the water, thereby lessening the submerged area of the hull with a consequent reduction of skin resistance, thus causing the boat, more or less, to plane or travel on the surface of the water, thereby permitting a relative high speed in proportion to the propulsive effort. The principles of hydroplane construction disclosed in and forming the basis of the two Fauber patents in suit have been generally recognized by those skilled in the art as of considerable practical value in speedboat construction and have been widely used in boat hull construction, and licenses have been granted under the patents.

The alleged infringing structures of the defendant described and illustrated in the findings above mentioned comprise and are limited to various forms of hull or pontoon construction utilized in seaplanes and flying boats, the

various types of which alleged infringing structures are included in the generic term of "hydroairplane." A hydroairplane consists of a hull or pontoon member or members associated with an airplane, and capable of maneuvering on the surface of water, taking off, flying, or maneuvering in the air and, subsequently, alighting on the surface of the water. While so maneuvering on the water the hull possesses all the characteristics and functions of a boat, and these characteristics and functions exist irrespective of the fact that the propulsive effort is obtained by means of an air propeller instead of a water propeller. In order to keep the length of the take-off run of a hydroairplane to a minimum, one of the essential features of the hull construction thereof is that of readily and quickly obtaining a high speed in the water in proportion to the propulsive effort, and the hull construction must therefore be of an efficient type.

The first patent in suit, #971029, is described and illustrated in findings 7 to 11, inclusive. The structure to which this patent is directed is a hydroplane boat provided with a bottom formed of a plurality or a series of surfaces, or members, located at each side of the central or keel line. These members possess the dual function of forming the flotation surface of the bottom and act as hydroplanes, and they are arranged in stepped relation with each other. The rear of each hydroplane member or surface forms a set-back shoulder or step with respect to the adjacent forward end of the next succeeding member, and these hydroplane surfaces are inclined laterally and downwardly from the chine, or margins of the boat to the keel thereof so that in cross-sectional form the hydroplane members form a **V**-shaped section from chine to chine (side to side) of the boat. See illustrations, Figs. 1 to 5, finding 7. The hydroplane members are progressively deeper in the water from the bow to the stern, as measured at the water line when the hull is at rest and supported by flotation, and they are of concave **V** form in cross-section from chine to chine.

In Figs. 6 to 9 of this patent, the forward hydroplane members measured from the rest water line are shown as being progressively deeper in the water from the bow to a point just aft of the midsection of the boat, the after mem-

bers being substantially all of the same depth. In the form disclosed in Figs. 6 to 9, all hydroplane members form a straight V-section from chine to chine of the boat. In both forms disclosed in Figs. 1 to 5 and 6 to 9, the boat has a pointed bow so that the width of the hydroplane members gradually increases from the bow to the widest part of the boat. When the boat starts from rest and its speed is gradually increased by means of the propeller at the stern, the hydroplane members function to divide and deflect the water against the next succeeding hydroplane member to the rear causing the boat to rise in the water, thus lessening its displacement. As the speed increases the displacement decreases and the boat automatically regulates its own depth to a degree of displacement according to the speed.

The claims of this patent which are in suit are directed to the lateral or crosswise inclination and the stepped relationship of a plurality of hydroplane surfaces, and such claims are not limited solely to boat construction as shown in the first embodiment of the patent (Figs. 1 to 5), which construction has the descending keel line throughout the entire length of the boat in contradistinction to the second embodiment (Figs. 6 to 9) in which the keel line only descends to a point somewhat aft of the center section of the hull.

The second patent, #1024682, relates in general to a hydroplane boat with a bottom formed of a plurality or a series of hydroplane surfaces or members located at each side of the central or keel line, which hydroplane surfaces are inclined laterally down toward the keel and form a concave or hollow V-shaped cross-section from chine to chine, the surfaces from fore to aft being arranged in stepped relationship. In general, this patent relates to the same type of hull as is above set forth and disclosed in the first patent, which patent is specifically referred to by application in the second patent. The structure of the second patent differs from that of the first patent in two distinctive features which are—

(1) Each of the two hydroplane members is arranged at opposite sides of the center line of the bottom and inclines laterally and downwardly toward the center line, each of the hydroplane members having its angle of rearward inclina-

tion at said center line less than angle of rearward inclination at its outer lateral margin. In other words, the V-shape of each of the hydroplane surfaces is warped or twisted so that an individual hydroplane surface becomes flatter fore to aft; (2) with respect to any two hydroplane surfaces arranged one to the rear of the other, the hydroplane members of the rear hydroplane surface have a less degree of lateral or transverse inclination than the hydroplane members of the forward hydroplane surface; that is to say, each rear hydroplane surface has a flatter V form than the forward hydroplane surface. Figs. 1, 5, and 5a of this patent, which disclose these features, are reproduced in finding 13.

Prior patents in the art covered by the two Fauber patents in suit, considered by or called to the attention of the Patent Office during the progress of Fauber's applications, are set forth as to the first patent in suit in finding 11, and as to the second patent in suit in finding 15. The prior art pertinent to the claims of the patents in suit is exemplified by the prior art patents and publications set forth in finding 17 and the disclosures of those prior patents and publications and the facts which are established by a consideration and study thereof in the light of the testimony of record are set forth in findings 18 to 23, inclusive, and no useful purpose would be served by a restatement here of the facts so established. These disclosures and the facts so found show that those skilled in the art of boat and hull construction were familiar with and had knowledge of hydroplane hull and boat construction as found in the ultimate facts stated in finding 36. Upon these evidentiary and ultimate facts, we have found the further necessary ultimate facts as set forth in findings 37 to 42, inclusive, which, for reasons stated therein, establish that Claims 1, 2, 5, and 6 of the first patent, #971029, in suit and Claims 1, 2, and 29 of the second patent in suit, #1024682, are invalid; that Claim 4 of the second patent is valid; that the terminology of this claim is applicable to the Government structures known as the Aeromarine Model 40, the HS type hull, and the NB-1 float mentioned in finding 24; and that in the manufacture and use of those structures the defendant has infringed this claim of the patent; that Claim 5 of the second patent is

also valid but, by reason of the limitations therein, the terminology of this claim is not applicable to any of the alleged infringing structures of the defendant and the claim has not, therefore, been infringed.

The essential evidentiary facts established by the record, which we think establish infringement of Claim 4 of the second patent, are shown by the typical illustrations in finding 24 of the HS hull (Fig. 5), the Aeromarine Model 40 (Fig. 2) and the NB-1 float-form plane, #3863, and the facts found in findings 27 to 29, inclusive, and findings 31 to 33, and 34.

On the matter of infringement, counsel for defendant contend that each of defendant's structures has a straight athwartship shoulder located substantially in vertical line with the center of gravity to form a pivotal point for longitudinal oscillation of the airplane in respect thereto, and has its forebody extending forwardly and upwardly therefrom to the bow, and has its afterbody extending rearwardly and upwardly therefrom to the stern, the forebody and the adjacent afterbody forming a longitudinal dihedral relationship; that this is an entirely different structure from the structure covered by any of the claims in suit; that it is the antithesis of a stepped-down descending keel-line relationship; that no matter what position the defendant's hulls may take in the water, the dihedral relationship remains between the forward body and its adjacent afterbody; that at no time does the afterbody form a stepped-down relationship with its forebody; that instead of gradually displacing or lessening the submerged area, under constant immersion of the stern, a sharp and abrupt separation of the afterbody, and also of the forebody, from the water is the dominant factor of defendant's hulls; that at no time can the structures covered by any of the claims of the patents in suit assume a position corresponding to the above-mentioned dihedral relationship, since the patentee's structure requires immersion of the stern at all times, which stern at no time is ever disposed upwardly with respect to the horizontal; that since the step-down descending keel is essential to all the claims in suit, the complete absence of it in defendant's structures makes infringement impossible; that

from the divergence in shape, resulting from the removal of the step-down descending keel relation, and the provision of the afterbody of defendant's hulls with an upward inclination with respect to the forebody preceding it, totally different modes of operation result; and that the individual functions of the patentee's paramount factor finds no counterpart or equivalent in any of defendant's hulls.

The defendant further contends that claim 4 of the second patent has other details of having two hydroplanes, of which the rearward hydroplane member is of less lateral inclination than the forward hydroplane member; that this relationship necessitates that the lower part of the rearward hydroplane is deeper in the water than the lower part of the forward hydroplane, otherwise the variation in angularity is meaningless; that the only disclosure in the patents is a series of nine hydroplanes in which each succeeding hydroplane has its rear end deeper in the water and blunter than the hydroplane preceding; that as none of the defendant's structures has the successive blunting of the angular sections working deeper in the water in the same manner as in the second patent, the defendant's structure in which a blunting of the succeeding angularity accidentally appears, but which inclines upwards and tapers in cross-sections to the stern, is totally different in substance from any claim of the second patent; that in those of defendant's structures in which the after portion of the hull has a slightly blunter transverse angularity than that of the forebody, this difference is so slight that no essential different action results therefrom; that the blunter angularity of the afterbody is offset from the forebody by the straight cross shoulder and the offset afterbody is inclined rearward upwardly from the straight cross notch to the stern, and its afterbody has its cross-sectional sections constantly decreasing towards the stern, the smallest section being at the stern; that the mere incident in the slight variation of transverse bluntness in certain of defendant's structures is of no consequence; that the blunter portion does not perform the same work as the blunter portion of the patented structure; that neither the means nor the result is the same, and that there is, in consequence, a total absence

of infringement of Claim 4 by these structures of the defendant. The substance and effect of defendant's contentions are that the afterbody of defendant's structures, hereinafter more fully discussed, is not a hydroplane surface so that, consequently, there is not a plurality of hydroplane surfaces, and that the terms of any claim must be limited to the structure referred to in the illustrated disclosures and can cover nothing but what is specifically shown. We think these contentions misinterpret the patents and also overlook certain other important considerations.

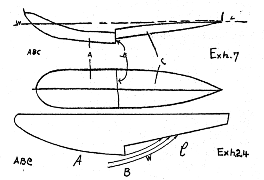
Claim 4 of the second patent now under consideration is as follows:

> A hydroplane boat provided with two hydroplanes arranged one at the rear of the other, and in stepped relation and having their bottom surfaces at their forward ends continuous with the flotation surface of the hull, said hydroplanes each consisting of two hydroplane members arranged at opposite sides of the center line of the bottom and inclined laterally and downwardly toward said center line; the said hydroplane members of the rearmost hydroplane having a less degree of lateral inclination than the hydroplane members of the forward hydroplane.

The definition of the term "hydroplane boat" used in the patent is not to be determined solely from the illustrated disclosures of the patents, which show no wings—but do not exclude them. It is well understood that hydroplane boats may, or may not, be provided with wings. When on the water, a hydroplane boat with or without wings necessarily has some part immersed and the extent of this part can be determined, if desired, by the use of a horizontal water rudder or by an air elevator. In *Smith* v. *Snow, et al.*, 294 U. S. 1, 11, the court said:

> We may take it that, as the statute requires, the specifications just detailed show a way of using the inventor's method, and that he conceived that particular way described was the best one. But he is not confined to that particular mode of use since the claims of the patent, not its specifications, measure the invention. *Paper Bag Patent Case*, 210 U. S. 405, 419; *McCarty* v. *Lehigh Valley R. Co.*, 160 U. S. 110, 116; *Winans* v. *Denmead*, 15 How. 330, 343.

The patent shows stepped hydroplane members which are downwardly inclined toward the keel line, and which are downwardly inclined from front to rear. Claim 4, now under consideration, specifically recites the downward inclination toward the keel line, but contains no limitation at all as to fore and aft disposition. All that the claim requires is that there be two or more hydroplane surfaces of the V section in stepped relation. The record conclusively shows that the defendant's structures which we have found to infringe this claim have the required plurality of hydroplane surfaces, and that the after-surface during taxiing has a hydroplaning action even when this after-surface is at a negative angle and that during the take-off run of the hydroairplane, when this after-surface assumes a positive angle, as it necessarily does, it is downwardly and rearwardly inclined. See findings 27, 28, and 29 and the illustrations, in finding 27, showing the three positions described therein of a conventional seaplane during the take-off run. In addition to the facts stated in the findings mentioned, and the illustrations there shown, there is produced below for the purpose of further discussion two illustrations designated Exh. 7 and Exh. 24 which will hereinafter be referred to as the ABC form.



The three illustrations reproduced in finding 27 show a seaplane with a hull of the type of the ABC form found to infringe Claim 4. When the speed of an engine is increased preparatory to taking off, the airplane goes through what is known as the taxiing stage, which brings the machine from "the idling position," shown in the first illustration (finding 27) to the position of "running on the step" shown in the third illustration of finding 27. During taxiing the after-portion of the float, designated C in Exhs. 7 and 24 above, goes down to the position shown in the second illustration (finding 27) termed "maximum nose-up" position. As the speed is increased, several factors, including the hydroplaning action on the after-surface C, hereinafter more fully discussed, cause the float to come up until it eventually attains the "running on the step" position wherein only the after-portion of the forward hydroplaning surface A is actually in the water. When this position has been attained, the operator ordinarily manipulates the longitudinal controls of the airplane in a manner to increase the angle of incidence of the wings, without, however, again submerging the after-surface C, and the airplane then takes off. It will be noted from the "maximum nose-up" position shown in the second illustration (finding 27) that the after-surface C is downwardly and rearwardly inclined at what the evidence shows, without dispute, is a positive angle. While the testimony of both parties is in agreement that the after-surface C of the hydroairplane hull is a "hydroplaning surface" when it is in this positive angle, there is a conflict in the testimony with reference to whether this after-surface C is in a hydroplaning attitude and acts as a hydroplaning surface when the plane is in the "running on the step" position, as shown in the third illustration (finding 27), but we are of opinion from a study of the entire record that the greater weight of evidence establishes that even with the after-surface C at a negative angle, i. e., upwardly and rearwardly during taxiing, it, nevertheless, acts during that time as a hydroplaning surface.

The ABC illustration, Exh. 24 above, demonstrates the correctness of this view, that the after-surface C, being in

contact with the surface of the water and receiving hydrodynamic action therefrom, is a hydroplane surface, and the evidence establishes the fact that during taxiing the after-surface C acts as a hydroplaning surface even when it is at a negative angle to the horizontal, as shown by the illustration ABC—Exh. 24. The flow of the water leaving the step strikes surface C with a lift component, as designated by arrows at "W". This is admitted by defendant's expert who termed this action of the water as an "inverted waterfall." He said:

> In the meantime, the step-action is coming into play and the water no longer flows close around the step, but flows as an inverted waterfall, making contact on the after bottom, further and further aft as planing is developed.

This expert further admitted that this flow of water and its action on the after-surface C, even while that surface was at a negative angle, would have a lifting effect.

In view of the facts set forth in the findings and for the reasons above stated, we think defendant's infringement of Claim 4 is clear for the reason that the after-surface C of the defendant's hulls is a hydroplaning surface and falls within Claim 4 of the patent which is of a scope sufficient to cover a construction in which is found two hydroplane surfaces in tandem and in stepped relation to one another. The fact that the forward surface A of the defendant's hull construction is a hydroplane surface has not been controverted and the testimony establishes that the after-surface of defendant's hull construction contributes a hydroplaning action. Whether or not Fauber recognized that his hydroplane boat was utilizable as an adjunct to the flying machine is of no moment. In *Kennicott Co.* v. *Holt Ice & Cold Storage Co.*, 230 Fed. 157, 160, the court said:

> Some utility is to be presumed from the grant; other uses and advantages need not be enumerated; even if unknown to the inventor the additional and the new uses are within the patent; and they may properly be considered in determining the status of the invention in the art.

In *Larson* v. *Crowther*, 26 Fed. (2d) 780, 787, the court held that—

> An inventor is entitled to all the uses to which his invention may be put, even if he is not aware of such uses when he secures his patent.

In this case the court, at page 788, quoted from *Minneapolis, St. P. & S. S. M. Ry. Co. et al.* v. *Barnett & Record Co.*, 257 Fed. 302, 312, as follows:

> Moreover, even if this want of perception of the benefits of his invention existed, it would not be fatal to his patent, for, when one has plainly described and claimed his improvements or combinations, and secured a patent for them, he has the right to every use to which they can be applied, and to every way in which they can be utilized to perform their function, whether or not he was aware of all these uses and methods of use when he claimed and secured his monopoly.

In *B. G. Corporation* v. *Walter Kidde & Co., Inc.*, 79 Fed. (2d) 20, 22, the court said:

> It is true that Paulson did not foresee the particular adaptability of his plug to the airplane; indeed, we may assume that he did not even know the especial needs of its engine. * * *; he is not charged with a prophetic understanding of the entire field of its usefullness.

The defendant may have made modifications as to specific form of the hull, but since it has retained the Fauber principle in its hull designs infringement is present for the reason stated by the court in *Norton et al.* v. *Jensen et al.*, 49 Fed. 859, 866:

> * * *. If the patentee's ideas are found in the construction and arrangement of the subsequent device, no matter what may be its form, shape, or appearance, the parties making or using it are deemed appropriators of the patented invention, and are infringers.

The addition by the defendant to the hydroplane boat covered by the patent of the aeroplane superstructure does not affect the ultimate question of infringement, for, as

was held by the court in *Cimiotti Unhairing Co. et al.* v. *American Unhairing Mach. Co.*, 115 Fed. 498, 504:

> * * *. The mere fact that there is an addition, or the mere fact that there is an omission, does not enable you to take the substance of the plaintiff's patent. The question is not whether the addition is material or whether the ommission is material, but whether what has been taken is the substance of the invention.

While it may be that in taxiing to the take-off, efficient operation of the hydroplane requires that the defendant's hulls rock forward to the "on the step" position, this is merely a matter of mode of operation and, as was said in *Auditorium Ventilating Corp.* v. *Greater Rochester Properties, Inc.*, 59 Fed. (2d) 450, 457:

> The claims in controversy are not specifically limited to details of operation.

In *Wright Co.* v. *Herring-Curtis Co. et al.*, 211 Fed. 654, the court pointed out that—

> * * * a machine that infringes part of the time is an infringement, although it may at other times be so operated as not to infringe.

The judgment of the court is that Claim 4 of the second patent is valid and that it has been infringed, and that plaintiff is entitled to recover, but entry of judgment will be withheld until the taking of evidence on accounting, showing the amount of compensation due, has been completed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, *concur*.

WHITAKER, *Judge*, took no part in the decision of this case.

EXCAVATING EQUIPMENT DEALERS, INC., v. THE UNITED STATES

[No. 43365. Decided March 3, 1941]

On the Proofs

Government contract; use by the Government of machinery on abandoned job.—Where plaintiff sold to a firm of contractors, on title-retaining contract, one reconditioned dragline with certain equipment; and where said contractors entered into a contract with the Government to install sewer and storm drainage systems at a naval air station, and began work on said job, utilizing the said dragline and equipment; and where later said contractors, having previously defaulted on said purchase contract, abandoned the work before completion, leaving the said dragline and equipment on the site of the job, and the work was thereafter completed by the Government, which used the said dragline and equipment only for about 16 hours on October 4 and 5, 1932; and where later verbally, and on October 20 and 21, 1932, in writing, the Government was notified that title to said dragline and equipment vested in plaintiff; and where said dragline and equipment were not used by the Government after such notice of ownership; it is *held* that there was no liability for use on the part of the Government and the plaintiff is not entitled to recover.

Same.—In order for the Government to be bound by a contract for the use of such property it would be necessary for the duly authorized public authority, the Bureau of Yards and Docks, either to have made an express contract for the use, or to have conducted itself in such a way that there would be an implied contract to retain for use and to pay the reasonable rental value for such use or retention for use.

Same; remedy for unreasonable delay.—If there was any unreasonable delay or negligence on the part of the Government officials in releasing the machine, it would be a matter of tort and not of contract; and therefore not within the jurisdiction of the Court of Claims at the time the cause of action in the instant case arose.

Same; retention for use in accordance with contract.—Retention for use, including actual use, made of the dragline prior to October 17, was pursuant to the express provisions of article 9 of the contract between the firm of contractors and the Government; and before anyone connected with the Government had any notice or knowledge of any claim of interest by the plaintiff.

Same; no liability without knowledge.—Where there was no meeting of the minds, either express or implied by circumstances, at a

time when the defendant had no knowledge of plaintiff's claim of interest, and where plaintiff did not know the machine was in the custory of the defendant, there could no priority of contract, and hence no liability on the part of the defendant to the plaintiff.

The Reporter's statement of the case:

Mr. Richard S. Doyle for the plaintiff.

Mr. Henry A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff was incorporated under the laws of the State of Delaware January 7, 1929, and was voluntarily dissolved June 29, 1936. During its lifetime it bought and sold used equipment, consisting generally of machinery for excavating work. Except for qualifying shares its stock was owned by the Harnischfeger Corporation, which manufactured and sold excavating equipment, traveling cranes, heavy machinery. Except for qualifying shares, the Harnischfeger Corporation also owned the stock of the Harnischfeger Sales Corporation, hereinafter at times referred to as the "Sales Corporation," which sold all the new equipment manufactured by the Harnischfeger Corporation. Plaintiff and the Sales Corporation had identical employees.

2. On August 10, 1931, the plaintiff entered into a contract with a partnership by the name of Jacobson & Mortenson, whereby plaintiff agreed to sell to Jacobson & Mortenson one used P & H model 206–B dragline, serial No. 3214, complete with used ¾-yard dragline bucket, machine wired complete for automatic Kohler Lighting Plant, including mounted gas tank for lighting plant, but without lighting plant proper, for shipment to Tuscaloosa, Alabama, at $7,250.00 f. o. b. cars at West Allis, Wisconsin; $1,250.00 cash before shipment was made, balance payable in 15 equal consecutive monthly notes for $400.00 each, first note to fall due 30 days after delivery of machine and the balance each 30 days thereafter until all were paid, notes to bear interest at 6% per annum. The contract provided:

> The title to and right of possession of the machinery, parts, tools, or equipment covered by this contract is to

> remain in vendor until the full purchase price, including any modifications or extensions of payment, whether evidenced by notes or otherwise, shall have been fully paid in cash. * * * It is further agreed that any and all attachments and accessories hereafter placed on said machinery and equipment and used in connection therewith, shall be deemed to become part of said machinery and equipment with title thereto in the vendor to the same effect as if said attachments or accessories were on said machinery and equipment and a part thereof at the time of delivery from the vendor to the vendee.

The ninth paragraph of the contract provided in part:

> Should vendee fail to make payment in accordance with the terms stated herein, the balance of the purchase price shall at once become due and payable, and vendor may take possession of the machinery, parts, tools, or equipment covered by this contract without legal process, and in such event and also in the event of such removal by legal proceedings (vendee paying all expenses thereof), all payments theretofore made under this contract shall be deemed to have been made for the use of the said machinery, parts, tools, or equipment, and for its deterioration in value during the time the same remained in vendee's possession, and shall be retained by vendor as such payment.

The contract is filed in evidence as plaintiff's Exhibit No. 3, and is made part hereof by reference. It was duly registered in the office of Judge of Probate, Tuscaloosa County, Alabama, August 14, 1931.

3. March 16, 1932, Jacobson & Mortenson, with whom plaintiff had a contract as related in finding 2, entered into a contract, numbered NOY-1406, with the United States, defendant herein, whereby the partnership agreed to install sewer and storm drainage systems at Corry Field (Naval Air Station), Pensacola, Florida. For use in the performance of this undertaking Jacobson & Mortenson transported the dragline which was the subject of the contract between themselves and plaintiff from Tuscaloosa to Corry Field, and used it in the work at Corry Field. The surety on the Government contract was the National Surety Company. Copy of the contract is filed in evidence and made part hereof by reference.

Jacobson & Mortenson abandoned the work on or about August 4, 1932, before its completion. The National Surety Company elected not to complete the work, and it was completed by the Government by the use of its own station labor.

Jacobson & Mortenson left on the site certain equipment, among which was the dragline.

Pursuant to Article 9 of the contract which provided that if the contractor's right to proceed was terminated, "the Government may take possession of and utilize in completing the work such material, appliances, and plant as may be on the site of the work and necessary therefor," the defendant took possession of certain appliances and materials left on the ground, among which was the dragline. This action was taken before plaintiff asserted any claim to the property.

The dragline was used by the Government October 4 and 5, 1932, a total of about 16 hours, in the digging of a trench 200 yards more or less in length for storm-sewer pipe, work which was part of the Jacobson & Mortenson contract. The material excavated was yellow sand, in which were occasional black-jack roots, and the digging was comparatively easy. Prior to the time the Government took over the work the contractor had operated the dragline some 799 hours thereon, a substantial portion of such operation being through material that had in it roots, stumps, and logs that had to be pulled or cut out. At the time the contractor abandoned the work the dragline which was left on the premises was not in good working order.

The wear and tear on the dragline during the Government's operation of it was negligible.

4. Jacobson & Mortenson defaulted on their payments for the dragline about February 1, 1932, and in the fall of 1932 plaintiff, after a search, located the dragline at Corry Field, Naval Air Station, Pensacola, Florida, with the following legend painted thereon: "The United States has taken possession of this article which was furnished by Jacobson & Mortenson for use on the work under Contract No. 1406, in accordance with Article IX of that contract."

A representative of the plaintiff, upon discovery of the dragline interviewed the Public Works Officer in charge of

the yard where the machine was located, for the purpose of regaining its possession. The officer informed plaintiff's representative that he could not release the machine without authority from the Bureau of Yards and Docks.

The Public Works Officer suggested the possibility of the Government's buying the dragline, and the Sales Corporation October 20, 1932, offered the Public Works Officer a selling price of $5,000.00, as is and where is, net cash, 30 days, or in the alternative an amount equal to the equity plus direct expenses of transfer of ownership. This was without the lighting plant.

The following day, October 21, 1932, the plaintiff transmitted to the Bureau of Yards and Docks the following letter:

> Our Company is the owner of Model 206-B, P&H dragline, serial #3214, with dragline bucket, wired complete for automatic Kohler lighting plant, which was used by Jacobsen and Mortenson on the above contract for the grading of Corry Field, U. S. Naval Air Station of Pensacola, Florida.
>
> The property is covered by a conditional sales contract under which there has been default for several months. The Naval authorities at Pensacola claimed the right to use this machine under the provisions of Jacobsen and Mortenson's contract with the United States. As the title in this property remains in us, we are desirous of securing delivery thereof. The Naval authorities resumed work, using the above machine, on September 27th.
>
> We are entirely agreeable to having the Government use this machine to complete the job, if they will agree to pay a reasonable rental for the property from September 27th until the work is completed. We consider $550.00 per month as a reasonable rental.
>
> The contractors under the above contract having defaulted and it appearing that there will be more than enough money left in the hands of the United States to complete the job, it is requested that the value of the rental be taken into consideration in any settlement made with the surety on the contractor's bond. The reasonable rental of the equipment is a proper charge to be included in the reasonable cost of completing the job by the United States. The surety on the contractor's bond has obtained the benefit of the savings due to the use of this machine instead of incurring the

expense necessary of acquiring and placing on the job another one.

Claim is therefore made under this contract for rental of the above machine at the rate of $550.00 per month, covering the period of its use.

October 26, 1932, the plaintiff by letter applied to the Chief of the Bureau of Yards and Docks for release of the dragline, unless the bureau desired to buy the machine.

The Public Works Officer October 27, 1932, acknowledged receipt of the Sales Corporation's offer to him of October 20, 1932, and informed the company that a purchase could not be made except through competitive bids.

5. The Bureau of Yards and Docks refused to surrender the dragline without a release from the National Surety Company. Accordingly, the local attorney of the National Surety Company at Atlanta, Ga., advised the Bureau of Yards and Docks February 13, 1933, as follows:

> We have been requested by our Home Office to notify you that it is agreeable with this Company for you to release to the proper and legal owners of same, the equipment used on the above project.
>
> Incidentally we understand that the equipment in question consists of an Austin Model B-F 5 Backfiller crane #11415 with boom scraper and all standard equipment. Also a P&H Model 206-B Dragline, serial number 3214 complete with 314 yard bucket. In regard to this last piece of equipment, please understand that we are releasing only the part mentioned, but are not releasing our right and title to the lighting plant which was added to this piece of equipment by Jacobson & Mortenson, our Principals.

The surety company did not advise the Bureau as to identity of the "proper and legal owners." The question as to separation of the lighting plant from the dragline and its disposal also had to be considered. The surety company wrote plaintiff's attorneys for instructions as to the lighting plant and advised the Public Works Officer March 10, 1933, that it was doing so.

On March 7, 1933, the National Surety Company wrote plaintiff's attorney to the effect that the situation had been needlessly complicated by the fact that both the Harnischfeger Sales Corporation and the Excavating Equipment

Dealers, Inc., had filed separate claims asserting ownership of the dragline, and that for this reason they had simply consented to the release of the machine to the "proper legal owner".; that the Surety Company had just found out that their interests were mutual and not antagonistic.

March 28, 1933, the plaintiff presented to the Bureau of Yards and Docks bill as follows:

> Rent of Model 206-B, P&H Dragline, serial No. 3214 used to complete contract for grading Corry Field, U. S. Naval Station, Pensacola, Florida—NOY 1406 from September 27, 1932, to January 30, 1933—at the rate of $550.00 per month—4 months 3 days $2,255.00.

On the 31st day of March 1933, the plaintiff's attorneys requested the Bureau of Yards and Docks to authorize the Public Works Officer to release the dragline to the plaintiff "if and when we produce to him consent of American Surety Company to such delivery."

April 24, 1933, the plaintiff inquired of the Bureau of Yards and Docks as to the status of its claim of March 28, 1933, for $2,255.00 rental.

May 8, 1933, the Chief of the Bureau of Yards and Docks gave the following authorization to the commandant of the Naval Air Station, Pensacola:

> 1. The release to the Excavating Equipment Dealers, Inc., of the Model 206 P&H dragline, serial No. 3214 (except the lighting plant added thereto by the contractor) used in the completion of Contract NOY-1406, is authorized. It is understood, that Messrs. Fisher and Fisher of Pensacola, representing this company, will submit the formal assent of the surety (National Surety Company) to this release.

May 12, 1933, the surety company transmitted the following release to the Public Works Officer at the Naval Air Station, Pensacola:

> Attorney Fisher called us this morning over long distance and called our attention to the fact that we had overlooked replying to his letter of March 13th in which he accepted our reservation of the light plant. It seems that our neglect to answer this letter has held up delivery of the dragline to Mr. Fisher and we there-

> fore promised him we would wire you at once and we enclose copy of message just sent you.
>
> You will, therefore, take this letter and telegram as your authority to turn over the dragline in question to Mr. William Fisher, minus the light plant. We are writing Mr. Fisher today and asking him to have the light plant stored for us. We are doing this to avoid bothering you with the matter, but if you have any different instructions from the Bureau of Yards and Docks at Washington, please advise. In other words, we simply wish to gather whatever salvage we can out of the job inasmuch as we will face a heavy loss, and this light plant seems to be about the only thing left on the job belonging to our principals, Jacobson & Mortenson.
>
> When you reply we would also be glad to hear from you as to the probable completion date of this project as we imagine it must be near.

On May 12, 1933, also, the plaintiff's attorney, in writing, made demand of the Public Works Officer for delivery of the dragline, concluding:

> We are getting L. M. Harvey to ship the dragline equipment (excluding the lighting plant) for us.
>
> This letter is to acknowledge release of the equipment to us and to request that L. M. Harvey be permitted to take the machine for us for shipment and his receipt for the machine, for our account, be taken at the time he gets it. He is authorized to receipt for the equipment for account of Excavating Equipment Dealers, Inc.

And on that date, May 12, 1933, the dragline, without the lighting plant, was released to and taken possession of by the plaintiff.

6. Plaintiff diligently pressed its claim for rental of $2,255.00, transmitting to the Bureau of Yards and Docks numerous letters on the subject, urging prompt settlement. On September 1, 1933, the Public Works Officer represented to the plaintiff that the bonding company was responsible for settling plaintiff's claim.

During the years 1933 and 1934 and in January of 1935, both the plaintiff and the Sales Corporation corresponded with the Public Works Officer and with the Bureau of Yards and Docks with regard to the status of the claims for rental,

repairs, reconditioning and freight, as well as in respect to the Government's settlement with the surety.

After January 1935, the claim was not further prosecuted by the plaintiff or any agency for it, until the filing of the original petition herein June 30, 1936.

7. On May 18, 1933, the plaintiff loaded the dragline for shipment by freight to Jacksonville, Florida, at a cost of $54.00, transported it by freight from Pensacola to Jacksonville May 23, 1933, at a charge of $214.11, and rebuilt and reconditioned the machine at Jacksonville at a cost of $484.90.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This action was brought by the Excavating Equipment Dealers, Inc., to recover from the United States the reasonable value of the alleged retention and use by the defendant of one used P. & H. Model 206-B Dragline, which, with certain attachments, plaintiff claims was retained and used during the period from September 27, 1932 to May 12, 1933. Plaintiff also claims damages for repair, reconditioning, loading, and freight.

The plaintiff was incorporated under the laws of the State of Delaware. It was one of the two subsidiaries of the Harnischfeger Corporation, a Wisconsin corporation.

On August 10, 1931, the plaintiff made a conditional sale of the above machinery to Jacobson & Mortenson, contractors. Under the terms of the contract there was a cash payment, the balance being payable monthly. The title was retained in the plaintiff until all the installments should be paid.

The conditional sales contract was duly registered in the office of Judge of Probate, Tuscaloosa County, Alabama, on August 14, 1931.

On March 16, 1932, Jacobson & Mortenson entered into a contract with the United States by the terms of which the partnership agreed to install sewer and storm drainage systems at Corry Field (Naval Air Station), Pensacola, Florida.

Jacobson & Mortenson transported the dragline equipment from Tuscaloosa County, Alabama, to Corry Field, Florida, and used it in the construction work at that place.

The surety on the Government contract was the National Surety Company.

The contractor abandoned the work on August 4, 1932, before its completion. The Surety Company elected not to complete the work and it was completed by the Government by the use of station labor.

Jacobson & Mortenson left on the site certain equipment among which was the dragline. Article 9 of the contract of the Government with Jacobson & Mortenson provided that in the event of termination by the Government, the latter might take over the work and prosecute the same to completion, and might utilize in completing the work such materials, appliances, and plant as might be on the site of the work and necessary therefor.

The dragline was used by the Government on October 4 and 5, 1932, in the digging of a trench for storm sewer pipes, it being a part of the work called for by the Jacobson & Mortenson contract.

On October 17, 1932, the plaintiff advised the defendant for the first time of its claim of the right to title and possession of the dragline equipment.

It was not used by the defendant after notice of such claim had been received.

The dragline was finally released to the plaintiff on May 12, 1933.

The primary question is whether there was an implied contract on the part of duly authorized United States officials to pay the reasonable rental value for the use of the dragline from the time the Government took possession of the property until the time the property was released, or any portion of such time.

We think that the peculiar facts and circumstances of this case are insufficient to justify the conclusion that there was such an implied contract.

It is true that the Government officials actually used this dragline on October 4 and 5, 1932, but at that time they had neither notice nor knowledge of any claim of ownership on the part of the plaintiff.

There was also placed on the dragline the following legend "The United States has taken possession of this article which was furnished by Jacobson & Mortenson for use on the work under contract No. 1406, in accordance with Article IX of that contract."

This had been placed on the dragline prior to notice or knowledge on the part of the defendant of any claim of interest by the plaintiff.

On October 17, 1932, a representative of the plaintiff visited Corry Field and for the first time notified the Public Works Officer of his claim that the dragline belonged to the plaintiff; that it had been sold on a conditional contract by the terms of which title was reserved in the plaintiff until all the installments had been paid; that the contractors, Jacobson & Mortenson, had defaulted in the payment due February 1, 1932, and on each succeeding monthly installment thereafter.

Plaintiff's representative on October 17 or 18, 1932, interviewed the Public Works Officer in charge of the yard where the machine was located. The officer informed plaintiff's representative that he could not release the machine without authority from the Bureau of Yards and Docks. The Public Works Officer suggested that the Government might be interested in buying the dragline.

On October 20 the Sales Corporation offered the Public Works Officer a selling price of $5,000. Again he was informed that the Bureau of Yards and Docks would have to pass on all these matters.

The following day, October 21, 1932, the plaintiff wrote the Bureau of Yards and Docks a letter in which it suggested that as the title to the property remained in it, it was desirous of securing delivery thereof, but in the same letter stated it was entirely agreeable to having the Government use this machine to complete the job, if the Government would agree to pay a reasonable rental from September 27, 1932, until the work should be completed. It suggested $550 per month as a reasonable rental. Nothing was said in this letter about the offer of sale which the plaintiff had made to the Public Works Officer.

On October 27 the Public Works Officer acknowledged receipt of the offer of sale made to him October 20, 1932, and informed the plaintiff that a purchase could only be made through competitive bids.

We will first consider the period after October 17, 1932.

Neither the defendant nor any of its representatives ever used the dragline for any purpose after the notice that was given by plaintiff's representative on October 17, 1932.

A great deal of correspondence was carried on by the officials of the plaintiff, the parent company and the sales company and their attorneys and representatives with the Surety Company and the Bureau of Yards and Docks of the Navy Department.

While some of this correspondence and apparent conversations seem surplusage, it was all done in an effort to clear the situation so that the property could be released.

The Bureau of Yards and Docks alone had the legal right to enter into a contract for the use of the property. The action taken must be by a duly authorized officer. *United States* v. *North American Transportation and Trading Co.*, 253 U. S. 330, 333. In order for the Government to be bound by such a contract it would be necessary for the duly authorized public authority, the Bureau of Yards and Docks, either to have made an express contract for the use, or to have conducted itself in such a way that there would be an implied contract to retain for use and to pay the reasonable rental value for such use or retention for use. *United States* v. *Minnesota Mutual Investment Co.*, 271 U. S. 212, 217; *Merritt* v. *United States*, 267 U. S. 338, 341; *Morse Dry Dock & Repair Co.* v. *United States*, 77 C. Cls. 57, 73.

The evidence does not show that these officials ever claimed the right to use the dragline or that they claimed any right to hold it at any time after October 17, 1932, except insofar as it might be necessary to protect themselves and the Government from any just claims by anyone who might assert an interest in the property or a part thereof, or any other right in the premises.

Many complications arose in the effort to secure the release of the property. It was necessary to secure a release

from the National Surety Company. It developed in the course of the correspondence that a Kohler Lighting Plant had been attached to the property; that this did not belong to the plaintiff but had been attached by Jacobson & Mortenson. The question arose as to who had the authority for removing the lighting plant, and what should be done with it.

It was necessary to secure release of a judgment against Jacobson & Mortenson which had been filed and under which a sheriff's levy had been made. Then also the plaintiff claimed items for repair and reconditioning, the expense of loading the machine and hauling it to the station and the freight charge from Pensacola to Jacksonville. Naturally all these things took some time.

The release of the machine was further complicated by the fact that both the Harnischfeger Sales Corporation and the plaintiff filed separate claims for the property, each claiming to be the owner. On March 7, 1933, the National Surety Company wrote plaintiff's attorney as follows:

> We are in receipt of your letter of March 1st and in reply wish to say that it is our belief that this situation has been needlessly complicated owing to the fact that we have had claims for this particular equipment filed with us by both the Harnischfeger Sales Corporation and the Excavating Equipment Dealers, Inc., and we now find that they are one and the same concern, or at least their interests are mutual in this transaction and not antagonistic. Therefore, when we wrote the Bureau of Yards and Docks at Washington, it was necessary for us to assent to the delivery of this equipment to the proper legal owners as we, of course, were under the impression that two different concerns were claiming the same piece of equipment.
>
> If you have the original retain[ed] title contract on this machine and will exhibit it to Commander Duncan, I am quite sure he will release the equipment to your clients. I am sending copy of this letter to Com. Duncan and suggesting that he turn over the equipment on the job to the parties who will exhibit to him legal evidence of ownership. I am further suggesting that he have the recipients execute a full and complete receipt to him for the equipment delivered.
>
> I am also calling Com. Duncan's attention to the fact that the lighting plant installed on the dragline by our

> Principals, Jacobson & Mortenson, is no part of the equipment as claimed by the Excavating Equipment Dealers. I am therefore requesting Com. Duncan to retain the lighting plant in his possession subject to our further orders.

In the light of these circumstances and the complications and peculiar facts of this case, we believe that there was no legal obligation on the part of the Government to pay the plaintiff the reasonable rental value of the machine during any portion of the period after October 17, 1933.

The plaintiff company sold this machine to Jacobson & Mortenson as a second-hand and rebuilt machine. They received a cash payment of $1,250; they also received five monthly installments of $400 each, a total payment of $3,250. Default in payments had occurred February 1, 1932. No great diligence appears to have been shown by the plaintiff in tracking down the machine and asserting its right thereto.

While a considerable period elapsed after October 17 before the machine was finally released, it was a period scarcely as long as the plaintiff had taken in locating the machine after the default in payment.

However, if there was any unreasonable delay or negligence on the part of the Government officials in releasing the machine, it would be a matter of tort and not of contract, and therefore not within the jurisdiction of this court at the time this cause of action arose. *Hijo* v. *United States*, 194 U. S. 315, 323; *Bigby* v. *United States*, 188 U. S. 400, 405; *Hill* v. *United States*, 149 U. S. 593, 598.

As to the 20 days' retention for use, including 2 days actual use, made of the dragline prior to October 17, this was done pursuant to the express provisions of Article 9 of the contract which gave the Government the authority to use this property in completing the work after the abandonment by the contractor. It was done before anyone connected with the Government had any notice or knowledge of any claim of interest by the plaintiff.

This period presents a different and somewhat more difficult phase of the problem. However, in order to come within the jurisdiction of this court the taking must be

made under such circumstances as to give rise to a contract, express or implied in fact, to pay compensation. *Hill* v. *United States*, supra; *Schillinger* v. *United States*, 155 U. S. 163; *Belknap* v. *Schild*, 161 U. S. 10; *John Horstmann Co.* v. *United States*, 257 U. S. 138, 146. Hence, this action must rest on a contract implied in fact. *Harley* v. *United States*, 198 U. S. 229; *United States* v. *Buffalo Pitts Co.*, 234 U. S. 228.

It is difficult to see how there could be any privity of contract, any implied meeting of the minds, either express or implied by circumstances, at a time when the defendant had no knowledge of plaintiff's claim of interest and the plaintiff did not know the machine was in the custody of defendant.

A construction contractor had defaulted. The machine was in his possession and on the ground at the time it was taken over. It was taken over under the plain terms of the contract in which the plaintiff had no part. If, at the time of such use, the defendant had known of the plaintiff's claim of interest, a different question would be presented.

The plaintiff also claims the expense of loading for shipment, the cost of transportation by freight from Pensacola to Jacksonville, and the expense of reconditioning the machine. Manifestly these expenses are not recoverable. The Government found the dragline on the property. It was not obligated to transport it or deliver it to any other point. *Riggsbee* v. *United States*, 58 C. Cls. 93, 97, 98.

Before the Government took over the property it was used for 799 hours by the contractor in heavy work at Corry Field in removal of roots, stumps, logs, and other heavy excavation.

The Government actually used the property for only 16 hours, and that in light excavation work. During that period the damage was negligible.

In addition to being a second-hand rebuilt machine at the time it was sold to the contractor it had been used by him prior to the time it was brought to Corry Field. It had been exposed to unusually bad weather conditions in September 1932.

We think there is no substantial claim for damages for any of these items.

We find that there was no unreasonable delay in returning this property.

Judgment will be entered in favor of defendant.

It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

UNITED FRUIT CO. v. THE UNITED STATES

[No. 43401. Decided March 3, 1941]

On the Proofs

Ocean mail contract; certificate by Postmaster General as to speed and pay.—Where plaintiff on March 21, 1930, entered into a contract with the Government, through the Post Office Department, whereby the plaintiff, among other things, agreed to carry ocean mails of the United States from New York to Port Limon, Costa Rica, on a designated route and "on a schedule approved by the Postmaster General that shall include" certain approximate annual trips, under the Merchant Marine Act of 1928; and where under said contract plaintiff was permitted initially to operate vessels of class 5 capable of a speed of 13 knots, and where plaintiff was required to substitute as soon as practicable after the beginning of the service vessels of class 4, capable of a speed of 16 knots; and where in the performance of said contract plaintiff on the first two sailings of the said route did operate newly constructed vessels which vessels, according to the logs of said voyages, qualified as class 4 vessels with a speed of 16 knots; and where the Postmaster General so certified to the General Accounting Office; it is *held* that plaintiff was entitled to be paid for said voyages at the rate specified for class 4 vessels, and is entitled to recover.

Same.—The defendant received the benefit of the higher rate of speed and quicker delivery on ships which had been specially built under the terms of the Merchant Marine Act, and the Postmaster General had the power and the right under said act to make the calculation on the speed of the vessel as determined by him.

Same.—There was no justification for the Comptroller General's application of a rate and clasisfication lower than that certified to him by the Post Office Department and provided by the contract.

The Reporter's statement of the case:

Mr. William I. Denning for the plaintiff. *Messrs. William K. Jackson* and *John W. Cross* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff and defendant entered into a contract March 21, 1930, whereby the plaintiff, among other things, agreed to carry mails of the United States from New York by Havana, Cuba, and Cristobal, Canal Zone, to Port Limon, Costa Rica, "on a schedule approved by the Postmaster General, that shall include," as the contract recited, "approximately twenty-six (26) trips per annum, from the beginning of the contract term which number of trips shall be increased to approximately fifty-two (52) trips per annum from the beginning of the second year of the contract term." The route so described was known and designated as "Route No. 40."

Paragraphs (g) and (h) of section 1 of the contract provided in words and figures as follows:

> (g) To provide and operate in the performance of this contract combination fully refrigerated passenger and cargo vessels of Class 5, capable of maintaining a speed of thirteen (13) knots at sea in ordinary weather, and of a gross registered tonnage of not less than seven thousand two hundred (7,200) tons;
>
> (h) To substitute as soon as practicable after the beginning of the service specified in this contract, and not later than three (3) years from the date on which the same was awarded, for the vessels originally accepted thereunder, or furnish in addition thereto, three (3) new combination passenger and cargo vessels of Class 4, capable of maintaining a speed of sixteen (16) knots at sea in ordinary weather, of a gross registered tonnage of not less than six thousand (6,000) tons, with all cargo space fully refrigerated and accommodations for not less than eighty (80) first-class passengers.

Section 2 continued:

(2) IN CONSIDERATION of the faithful performance of the services herein specified, and upon receipt of satisfactory evidence thereof by the Postmaster General, the United States agrees to pay to the said contractor monthly, and as soon after the close of each month as accounts can be adjusted and settled, compensation based upon the mileage on the out-bound voyages by the shortest practicable route between the ports specifically stated herein, for vessels of Class 5, at the rate of Four ($4.00) Dollars per nautical mile, and for vessels of Class 4 at the rate of Six ($6.00) Dollars per nautical mile; and in the event service is performed in additional vessels of these or other classes under the provisions of Section 4, paragraph (d), for vessels of Class 7, at the rate of One and fifty one-hundredths ($1.50) Dollars per nautical mile, for vessels of Class 6 at the rate of two and fifty one-hundredths ($2.50) Dollars per nautical mile, for vessels of Class 5 at the rate of Four ($4.00) Dollars per nautical mile, for vessels of Class 4 at the rate of Six ($6.00) Dollars per nautical mile, for vessels of Class 3 at the rate of Eight ($8.00) Dollars per nautical mile, for vessels of Class 2 at the rate of Ten ($10.00) Dollars per nautical mile, and for vessels of Class 1 at the rate of Twelve ($12.00) Dollars per nautical mile.

Paragraphs (c), (d), and (e) of Section 4 provided:

(c) That the vessels to be constructed under the provisions of section 1, paragraph (h) of this contract are to be constructed as provided by section 405 (b), "Merchant Marine Act, 1928," according to plans and specifications approved by the Secretary of the Navy, and are to be in addition to any vessels which the contractor may be required under another contract to construct or furnish;

(d) That with the consent of the Postmaster General the contractor may construct and/or operate in the performance of this contract vessels of Class 4 and other classes in addition to those specified in Section 1, paragraphs (g) and (h) hereof, in such way and for such purposes as may be agreed upon by the parties;

(e) That upon the agreement of the Postmaster General and the contractor any vessel constructed under the terms of this contract may be operated on any American foreign trade or ocean mail route, and the mail pay for such operation shall be that authorized for the service on the route over which the vessel is operated.

Paragraph (c) of Section 5 provided:

> That this contract is subject to all of the provisions of the "Merchant Marine Act, 1928," and of the advertisement of the Postmaster General hereinbefore mentioned, and to the provisions of the Postal Laws and Regulations applicable to the ocean mail service; and the same are hereby made a part of this contract.

The term of the contract was ten years beginning March 21, 1932.

The advertisement referred to in and made a part of the contract provided in part:

> The Postmaster General and the contractor may agree upon the construction and/or operation of higher or lower Class vessels and for a greater or smaller number of voyages than those specified.

Copy of the contract and advertisement is filed in the case and made part hereof by reference.

2. On March 8, 1932, the Post Office Department by letter requested plaintiff to furnish a list of steamers which plaintiff would operate on Route No. 40, to which plaintiff replied by letter dated March 11, 1932, as follows:

> Referring to your letter of March 8 in connection with Foreign Ocean Mail Route No. 40, New York by Havana and Cristobal to Port Limon;
>
> We are planning to operate the new S. S. *Chiriqui* as the first sailing on this route on the following schedule:
>
> New York, March 24
> Havana, March 28
> Cristobal, March 31
> Limon, April 1
>
> After this voyage the S. S. *Chiriqui* will proceed to San Francisco to begin operating on Route No. 39.
>
> We expect to have the S. S. *Antigua* delivered to us about the first of April. If this ship is delivered on time, we anticipate sailing her on this route for one voyage, thereafter on Route No. 39. The new S. S. *Quirigua* and the new S. S. *Veragua* will be delivered to us later in the year and one or the other, or both, of these vessels will be operated on Route No. 40.
>
> In the meantime, in addition to the foregoing vessels we expect to maintain service on Route No. 40 with the S. S. *Calamares* and S. S. *Pastores*.

Definite schedule will be sent you later when we are more certain with respect to the delivery dates of the new ships.

Under date of March 18, 1932, the Post Office Department communicated with plaintiff, in reference to plaintiff's letter of March 11, 1932, by letter as follows:

With reference to your letter of March 11 concerning the commencement of service on Ocean Mail contract route No. F. O. M. 40, it is requested that this Department be furnished with a schedule showing the sailing dates from New York as well as the arrival and departure dates at the other ports on the route as it is necessary that this schedule be approved before payment for the service performed can be made.

To this letter of March 18, 1932, the plaintiff replied March 21, 1932, inclosing the schedule requested, showing sailings of the steamships *Chiriqui*, *Antigua*, *Calamares*, *Pastores*, on Route No. 40, beginning with the *Chiriqui* from New York March 24, 1932, and ending with the *Pastores* therefrom May 26, 1932, and stating:

As we pointed out in our letter of March 11, both the *Chiriqui* and the *Antigua* are to be assigned for operation on Route No. 39 upon the completion of the first voyage of each of these vessels at Port Limon.

The *Calamares* and *Pastores* shown on this schedule are Class 4 ships. The *Chiriqui* and *Antigua* are, of course, new vessels recently constructed.

We expect delivery of the *Quirigua* about the first of June. This vessel is scheduled for assignment to Route No. 40. As soon as we are definitely informed regarding her delivery date, we will advise you regarding her sailing date.

The *Veragua* is expected to be delivered to us about the first of August when she will be assigned to Route No. 40.

Because of the destruction of the *Segovia* by fire, the placing of a third ship on Route No. 40 will be somewhat delayed. Therefore after the first of August we are now planning to run the *Quirigua*, *Veragua*, and either the *Calamares* or *Pastores* on Route No. 40.

The Post Office Department would not approve this schedule in its entirety because of irregularity and lack of details and on March 25, 1932, the plaintiff submitted an-

other schedule showing, however, the same departures from New York, and stating:

> As you will note, with one exception, the S. S. *Antigua*, scheduled to sail from New York on April 3, all sailings are at equal intervals. It is necessary to get this steamer away not later than April 3 in order to enable her to get in position for her regular sailing on F. O. M. Route No. 39, and I would like very much to have her approved for this one voyage on Route No. 40 inasmuch as the following sailing, that is, the S. S. *Toloa* from New York on April 7, is not eligible for mail pay under contract as this vessel was placed under the American flag subsequent to the passage of the Merchant Marine Act of 1928.
>
> The fourth one of our new ships, the S. S. *Quirigua*, is expected to be delivered in time for the sailing of June 2, or June 9 at the latest, when the S. S. *Toloa* will be withdrawn from this route, leaving the service to be performed by the *Quirigua*, *Calamares*, and *Pastores*, all of which are eligible for mail pay under contract, until such time as the *Veragua* is delivered, about August 1, when she also will be assigned to this route and either the *Calamares* or *Pastores* withdrawn.
>
> Our plans for re-shipping this route have been somewhat upset and delayed due to the destruction of the S. S. *Segovia* by fire at Newport News last December, but I trust you will find the enclosed schedule satisfactory.

On March 29, 1932, the Post Office Department approved the revised schedule and notified the plaintiff that it was satisfactory.

Return voyage schedules were not requested by the Department or submitted by the plaintiff.

The S. S. *Chiriqui* and S. S. *Antigua* sailed from New York March 24 and April 3, 1932, respectively, according to the schedules previously approved by the Post Office Department, and performed the service required under the contract of March 21, 1930. They then proceeded from Port Limon to San Francisco, California, and operated on Route No. 39, which was out of San Francisco.

The mail service that would have been performed by S. S. *Chiriqui* and S. S. *Antigua* on a return to New York on Route No. 40, instead of their proceeding to San Francisco on Route No. 39, was performed by plaintiff's two vessels, the *Calamares* and *Pastores*.

In order to determine the class to which the vessel belonged, it was necessary to have the log of the first voyage, since the classification depended upon actual speed. Upon receipt of this log the Post Office Department April 15 and 26, 1932, respectively, issued orders classifying S. S. *Chiriqui* and S. S. *Antigua* as vessels of Class 4 on Route No. 40, under Merchant Marine Act, 1928.

The plaintiff followed the sailings of the *Chiriqui* and *Antigua* from New York with three sailings of Class 5 vessels, when Class 4 vessels were substituted.

3. The distance covered by S. S. *Chiriqui* and S. S. *Antigua* was 2,381 miles. The Post Office Department certified to the Comptroller General $28,572.00 as payment due plaintiff for the two voyages, at the rate of $6 per nautical mile, which was the rate for Class 4 vessels. The Comptroller General October 25, 1932, allowed only $4 per nautical mile, which was the rate for Class 5 vessels, a total of $19,048.00 and reduction of $9,524.00.

Warrants aggregating $19,048.00 were transmitted to plaintiff in payment and were by plaintiff refused and returned, with request for reconsideration. The Comptroller General reconsidered the matter, canceled the warrants and issued a warrant in lieu thereof in the sum of $908.31, the calculation of which amount is on the poundage basis and transmitted the new warrant to the plaintiff.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

This suit is for the recovery of the difference between compensation for transporting mails on a foreign ocean mail route computed under a contract therefor and the amount allowed and paid by the Comptroller General computed on a poundage basis.

Plaintiff and defendant entered into a contract dated March 21, 1930, whereby the plaintiff, among other things, agreed to carry ocean mails of the United States from New York by Havana, Cuba, and Cristobal, Canal Zone, to Port Limon, Costa Rica, "on a schedule approved by the Postmaster General, that shall include" certain approximate

annual trips. The route so described was known and designated as Route #40.

This contract was based on the Merchant Marine Act, 1928, 45 Stat. 689, chap. 675, which empowered the Postmaster General to enter into contracts, after advertisements and bids, to carry mails on certain designated routes between the United States and foreign countries. The act fixed certain rates to be allowed on vessels according to their speed and these vessels had to be built under the terms of the act, which specified in Section 405 (b) that the vessels should be constructed

> (1) according to plans and specifications approved by the Secretary of the Navy, with particular reference to economical conversion into an auxiliary naval vessel, or (2) a vessel which will be otherwise useful to the United States in time of national emergency.

Under Section 402 of the act, the Postmaster General was required to certify to the United States Shipping Board what ocean mail routes should be established and have vessels documented under the laws of the United States to carry merchandise, distributed so as equitably to serve the Atlantic, Mexican Gulf, and Pacific coast ports.

In response to the advertisements by the Postmaster General, plaintiff entered a bid which was accepted on Route 40. Plaintiff had also entered into a contract with the Postmaster General for the carrying of the ocean mail on Route 39, commencing from a port on the west coast and continuing to South American ports.

Under the contract for service on Route 40, plaintiff agreed to operate vessels of Class 5 capable of a speed of 13 knots. Under paragraph (h) of Section 1, plaintiff was required to substitute as soon as practicable after the beginning of the service, and not later than three years from the date of the contract, three new combination passenger and cargo vessels of Class 4, capable of maintaining a speed of 16 knots. The contract provided also that vessels should be classified on the basis of speed without regard to tonnage with the consent of the Postmaster General. It further provided that the plaintiff might substitute and operate vessels in Class 4 and other classes in addition to those specified in Section 1, paragraphs

(g) and (h) of the contract in such way and for such purposes as might be agreed upon by the parties.

It appears from the evidence that the plaintiff had entered into a contract for the construction of six vessels to be built in the United States under the terms and conditions of the "Merchant Marine Act, 1928" and that on March 8 the Postmaster General requested plaintiff to furnish a list of the steamers which would operate on Route 40 at the commencement of service. At this time the plaintiff had had delivered to it, or about to be delivered to it, two new vessels of the six ordered to be constructed by plaintiff. By letter dated March 11, 1932, plaintiff notified the Post Office Department that it proposed to operate the new S. S. *Chiriqui* as the first sailing on this route to depart from New York on March 24 and at the completion of the outward bound trip to Port Limon this ship would proceed to San Francisco to begin operation on Route 39. Plaintiff also proposed the sailing on April 3 of the new S. S. *Antigua* on the same route for one voyage, this ship thereafter to be placed on Route 39. Both of these ships were new vessels and their actual speed was unknown. After the exchange of letters between the Post Office Department and plaintiff in which permission was asked for the approval of the sailing of these vessels on the outward bound voyage on Route 40 and their subsequent service on Route 39, the Department notified plaintiff that the final schedules as submitted by the plaintiff were satisfactory. Both of these vessels sailed on the dates furnished the Post Office Department and carried the ocean mail to the ports specified in the schedule and then proceeded to San Francisco, California, for service on Route 39.

The logs of the ships were submitted to the Post Office Department as the basis upon which to calculate the speed of the vessels and, upon this calculation, to fix the rate of pay for the ocean mail carried according to the schedule set out in the act of 1928 and the contract entered into between the plaintiff and the defendant. As a result of this calculation the Post Office Department certified to the General Accounting Office that the plaintiff was entitled to be paid on the basis of the rate fixed on Class 4 vessels with a speed of 16 knots, which carried the rate of $6.00 per nautical mile, and had

therefore earned the sum of $28,572.00, as payment for services rendered in carrying the ocean mail. The Comptroller General disregarded the classification on these vessels and treated them as Class 5 vessels, which allowed only $4.00 per nautical mile, and issued warrants aggregating $19,048.00 to the plaintiff in payment of the service rendered. Plaintiff refused to accept and asked for a reconsideration, returning the warrants. The Comptroller General reconsidered the matter, cancelled the warrants, and issued a new warrant in the sum of $908.31, based on poundage rates.

It is admitted by the defendant that the calculation on the poundage basis is erroneous. However, it is contended that the plaintiff is not entitled to receive payment under Class 4 but only on Class 5 with the rate of $4.00 per nautical mile instead of $6.00. This brings us to an interpretation of the contract.

Plaintiff was required under paragraph (h) of Section 1 to substitute as soon as practicable after the beginning of service specified in this contract, and no later than three years from the date on which the same was awarded, three new combination passenger and cargo vessels of Class 4 with a speed of 16 knots. The advertisements for bids referred to and made a part of the contract provided:

> The contractor and the Postmaster General may agree upon the operation of additional vessels of Class 4 and/or other Classes.

The evidence plainly shows that plaintiff was endeavouring to carry out the intent and purpose of the act of 1928 in having these two new ships constructed and that the Postmaster General had agreed that they be used on the outward bound voyage and carry the mail under the contract. As the actual speed of these vessels was unknown, it was necessary for their logs to be submitted to the Postmaster General and a calculation made as to the speed maintained on the voyage in order to fix the basis of the rate of pay as provided in the contract.

The Post Office Department found as a fact that these vessels belonged in Class 4 and that their speed, as shown by the logs, was 16 nautical knots, and therefore allowed the plaintiff the rate of pay as provided in the contract for

vessels of Class 4. We can find nothing in the contract or the evidence which requires Class 5 vessels to first be put on a route and then vessels of a higher rate of speed substituted thereafter. The act and the contract only provided that such substitution should be made three years after the contract had been entered into. There was nothing to prohibit the plaintiff from providing and operating on the initial trip a vessel with a speed over 13 knots, or the Post Office Department from accepting such service. The vessel of course had to be capable of maintaining 13 knots.

There is nothing in the contract which requires any substitution at any particular time. The defendant received the benefit of this higher rate of speed and quicker delivery on ships which had been specially built under the terms of the Merchant Marine Act, and the Postmaster General had the power and the right under this act to make the calculation on the speed of the vessel as determined by him. (Sec. 408, *Merchant Marine Act, supra.*)

We can find no justification for the Comptroller General's application of a rate and classification lower than that certified to him by the Post Office Department and provided by the contract.

Plaintiff is entitled to recover the difference between the amount allowed by the Comptroller General and the amount due plaintiff under the higher rate, or the sum of $27,663.39. It is so ordered.

LITTLETON, *Judge;* and GREEN, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

HERBERT M. BARUCH CORPORATION, LTD., HERBERT M. BARUCH, AND MILTON BARUCH v. THE UNITED STATES

[No. 43316. Decided March 3, 1941. Plaintiff's motion for new trial overruled June 2, 1941]

On the Proofs

Government contract; extra costs incident to delay; unforeseen conditions.—Where on January 12, 1933, the plaintiffs entered into a contract with the defendant, by the terms of which plaintiffs

agreed to furnish all labor and materials and to perform all work required for wrecking and removing old buildings and constructing 17 new buildings for the Veterans' Administration at San Francisco, California, and for the reconditioning and rebuilding of two other structures, including fences, gates, roads, walks, grading, and drainage; and where plaintiffs performed said work and completed said buildings and other phases of the contract; and where delay was caused and a revision of the plans was necessitated by the discovery of unforeseen conditions in connection with the foundations of building No. 2; it is *held* that the plaintiffs are entitled to recover.

Same.—Where extra costs are incurred by contractor due to unforeseen or unknown conditions in construction or excavating foundation of buildings, the changes thereby required are not necessarily reasonable changes contemplated in the contract, and contractor may recover the actual costs thus incurred. *Rust Engineering Co.* v. *United States*, 86 C. Cls. 461, 475, cited.

Same; suspension of work on Government's order.—Where, in pursuance to the Government's economy program, orders were given to the plaintiffs by the defendant to discontinue work on building No. 1, with a view to the possible elimination of said building from the project, and work was accordingly stopped for 116 days, at the expiration of which time, by order of the defendant, work on said building was resumed and ultimately completed; it is *held* that the delay so caused was not the fault of the contractor and plaintiffs are entitled to recover the actual and necessary costs thereby incurred.

The Reporter's statement of the case:

Mr. Bernard J. Gallagher for the plaintiff. *Mr. M. Walton Hendry* was on the briefs.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiffs entered into a contract with the defendant January 12, 1933, numbered VAc-336, whereby, for the consideration of $898,810.00, the plaintiffs undertook to furnish all labor and materials, and perform all work required for wrecking and removing old buildings and constructing and finishing for the Veterans' Administration at San Francisco, California, Administration Building No. 1, Main Building No. 2, Boiler House No. 3, Ward Building No. 4,

X-ray Building No. 5, Dining Hall and Attendants' Quarters Building No. 6, Recreation Building No. 7, Nurses' Quarters Building No. 8, Officers' Duplex Quarters Building No. 9, Officers' Duplex Quarters Building No. 10, Manager's Residence Building No. 11, Garage and Attendants' Quarters Building No. 12, Laundry Building No. 13, Pump, Meter, and Transformer House Building No. 15, Gate House Building No. 16, Animal House Building No. 17, Flagpole, Connecting Corridors Nos. 1–2, 2–4, 2–5, 4–6, and 2–7, together with the revision and reconditioning of one Officers' Apartment Building (existing Building No. A 23–24), and the moving and reconditioning of existing Building No. A 4; including the fences and gates, roads, walks, grading, and drainage in connection with these buildings, but not including plumbing, heating, electrical work, and outside distribution systems, electric and hydraulic elevators, and refrigerating and ice-making plant, all in accordance with designated specifications, schedules, and drawings, made part of the contract, and with the contractor's proposal dated December 15, 1932, and letter of acceptance dated January 12, 1933. The work was to be commenced within 20 calendar days after date of receipt of notice to proceed and was to be completed within 425 calendar days after date of receipt of notice to proceed.

The contracting officer for the Government was L. H. Tripp, Director of Construction, Veterans' Administration.

Copy of the contract and specifications is in evidence and made part hereof by reference.

2. On February 3, 1933, the contractor received notice to proceed. This fixed the ultimate date for completion of the contract April 4, 1934.

In the course of the contract work numerous orders were issued by the contracting officer for changes in the work, all of which were modifications of the contract under Article 3 thereof. These change orders were lettered in alphabetic sequence, increased or decreased the contract price, and in instances extended the time for completion. They are summarized as follows:

Change order	Date	Increase	Decrease	Additional days
A	May 15, 1933 (Rock excavation, Bldg. #2)	$2,181.00		12
B	June 16, 1933 (Omission of two areaways east side Bldg. #A23-24).		$29.00	None
C	July 25, 1933 (Rock excavation, Bldg. #12)	516.00		12
D	Aug. 11, 1933 (Furnishing and installing window shades, Bldg. #8).	76.00		None
E	Aug. 19, 1933 (Revision of footings, Bldg. #2).	$11,262.00		30
F	Sept. 16, 1933 (Omission of concrete piles, Bldgs. #1, 5, 6, 8, 13, connecting corridors #1-2, 2-7).		$10,670.93	None
G	Sept. 19, 1933 (Foundation changes, Bldg. #7).	4,844.00		None
H	Oct. 12, 1933 (Lowering exterior walls, Bldg. #1).	294.49		None
I	Oct. 3, 1933 (Change in garden gates, quarters buildings).	$169.00		None
J	Oct. 13, 1933 (Piers and footings in lieu of piles, connecting corridors, Bldgs. #1 and 2).	263.22		None
K	Oct. 14, 1933 (Structural changes, Bldg. #2)	624.07		None
L	Dec. 9, 1933 (Installing copper scuppers, Bldgs. #9 and 10).	16.00		None
M	Jan. 17, 1934 (Increasing width, elevator machine rooms, Bldg. #2).	55.00		None
N	Mar. 5, 1934 (Changing marble shower partitions, Bldg. #1).	35.00		None
O	Mar. 14, 1934 (Furnishing and installing wrought-iron gates in wall between Bldgs. #8 and 9).	345.00		None
P	Mar. 14, 1934 (Constructing vent duct, bakery, Bldg. #6).	267.00		None
Q	Mar. 14, 1934 (Alteration in wall, elevator machine room, Bldg. #1, $10.65; furnishing and installing iron window railings, Bldg. #2, $256.00; alteration of building tile partitions, $154.02).	420.67		None
R	Apr. 24, 1934 (Additional roads, curbs, sidewalks, retaining wall, gutter).	18,053.26		30
S	Apr. 24, 1934 (Installing 4 heavy angles, corridor 4-6).	302.95		None
T	May 9, 1934 (Additional concrete protection, control cables).	511.70		None
U	June 1, 1934 (Changing height of mirrors)	78.41		None
V	June 22, 1934 (Additional subsoil drain, Bldg. #2).	33.52		None
W	July 14, 1934 (Door in concrete wall, Bldg. #1).	164.56		None
X	Aug. 20, 1934 (Tie rods, upper retaining wall).	458.23		None
Y	Sept. 18, 1934 (Rock excavation for subsoil drain).	115.50		None
Z	Sept. 22, 1934 (Change in metal cupboards)	150.00		None
		41,051.58	10,884.93	84
	Less	10,884.93		
	Net increase	30,166.65		

These change orders had the effect of increasing the contract price from $898,810.00 to $928,976.65 and of postponing the final date for completion from April 4, 1934, to June 27, 1934.

Copies of the orders are in evidence and are made part of these findings by reference.

3. The contractor performed all the work agreed to, and it was accepted by the Government as complete August 24, 1934. After attending to minor odds and ends the contractor's organization left the site September 6, 1934.

Having completed the work August 24, 1934, the contractor was 58 days late in performance, beyond the date for completion as extended by change orders.

On the 24th of April 1934, the contracting officer made the following findings of fact and transmitted them to the contractor:

> Under contract of VAc–336, dated January 12, 1933, you are required to perform the General Construction work specified for Veterans' Administration Facility at Ft. Miley, San Francisco, California, and to complete the work within Four Hundred Twenty-five (425) Calendar Days after February 3, 1933, the date when you received notice to proceed, making April 4, 1934, the contract date for completing the work, a date which has been changed on account of additional requirements. It is noted that your progress was interrupted by the consideration of changes proposed by the Government and by conditions not contemplated by the contract and that your contract work will not be completed until later than the contract date for completion.
>
> Under Article 9 of the contract, I have ascertained the facts and extent of this delay and find: (1) That the contract work includes the construction of a group of buildings which are to serve individual purposes, but all of which are essential to the operation of the hospital as a unit; (2) that of these buildings the Administration Building No. 1 and the Main Building No. 2 constitute more than one-half of all the contract work and, barring possible conditions which might prevent the completion of other buildings along with these buildings, would determine the length of time consumed in the construction of the hospital; (3) that subsurface conditions not contemplated by the contract were encountered during March 1933; (4) that your foundation work on Building No. 2 was stopped by the Government March 21, 1933, pending a decision regarding the alterations in foundations required by the subsurface conditions mentioned, which was not made until July 22, 1933; (5) that your work on Administration Building No. 1 was stopped by the Government May 8, 1933, pending a decision whether this building

should be eliminated from the contract, and that you were instructed July 27, 1933, to resume work on this building; (6) that between March 21, 1933, and July 27, 1933, your work on other buildings was also delayed, but, in no case, beyond July 27, 1933; (7) that you were allowed twelve (12) Calendar Days additional time, (Change Order "C"), for extra rock excavation performed within the period from March 21, 1933, to July 27, 1933, and that the remainder of this period, One Hundred Sixteen, (116) Calendar Days, shows the extent to which you were delayed during this period by the Government pending its decisions regarding the changes in foundations and the possible elimination of the Administration Building No. 1.

In estimating for its bid the contractor had planned on completing the work in about 12 months.

The contract price of $928,976.65 has been paid by the defendant to the contractor in full, without deduction of liquidated damages for delay.

4. The contractor began the work in due time.

On March 21, 1933, excavation was in progress for the foundations of Main Building No. 2. What was apparently a dike of rock was encountered extending upward in the area designed for the sub-basement, rock that had escaped previous exploratory borings by the Government. This being an unforeseen subsurface condition the contract price was increased by $2,181.00 and the time for performance extended 12 days to cover the removal of this rock. See Change Order A which is made a part of this finding by reference. The footings of the building had been designed to rest on hard blue clay, through which the unexpected dike projected. This situation necessitated revising the footings and on March 21, 1933, the defendant's Supervising Superintendent of Construction ordered excavation in the extreme east end of the east wing stopped in order that the proper investigation might be made and the footings redesigned. Foundation work continued in other portions of the building until April 25, 1933, when it was ordered stopped because seven-day cylinder tests of samples of the concrete being poured indicated it did not come up to the standard required. Core borings were then made of the concrete actually in place, and the test of the core bor-

ings indicated the concrete was satisfactory. However, the intrusion of the supposed dike or pinnacle of rock in the center of the building required detailed investigation and study. It was finally ascertained that the rock was in fact a large boulder entirely submerged in blue clay. The problem before the Government engineers was to secure uniform bearing value under all footings. Load-bearing tests, in addition to those already made, were found necessary, and the plaintiffs were given this work to do by separate contract, which plaintiffs accomplished in two or three weeks, concluding the tests the latter part of May or fore part of June 1933. The situation disclosed by these investigations and tests demanded a revision in drainage as well as revision in footings. Sketches and drawings were prepared accordingly and August 1, 1933, the contractor submitted to the contracting officer a proposal covering the work, which was accepted and resulted in the issuance of Change Order E, increasing the contract price by $11,262.00 and extending the period of performance 30 days. In its proposal the contractor reserved claim for damages for the delay occasioned by inability to proceed with the work while the change was under consideration.

Work on the foundations of Building No. 2 was ordered by the contracting officer July 21, 1933, to be resumed and it was thereupon resumed by the contractor.

Foundation changes were also necessary for Building No. 7, the Recreation Building, and work on the foundations for that building had also been stopped. An order of resumption was given by the contracting officer July 22, 1933, and the contractor thereupon resumed operations on Building No. 7. For the foundation changes on Building No. 7 Change Order G was issued, increasing the contract price by $4,844.00, with no extension of time for performance, in accordance with a proposal of the contractor which reserved claim for damages for delay occasioned by inability to proceed while the change was being considered.

5. The Director of the Budget addressed the Administrator of Veterans' Affairs April 14, 1933, as follows:

> It has come to my attention that the new hospital which is under contract at San Francisco is not yet beyond the stage of excavation.

> I understand that, under the new regulations, additional facilities will not be required, and that therefore whatever can be avoided in this projected expenditure of $1,200,000 would be a clear saving.
>
> Under these circumstances, I suggest that the contract should be canceled. Certainly the amount of damages which thereby would accrue to the contractor would be far less than the expenditure otherwise.
>
> I imagine there will be other similar cases which should have consideration.

Thereafter, May 8, 1933, the contractor received from the contracting officer the following telegram:

> Reference contract construction San Francisco California discontinue immediately work on administration building number one (stop) prepare and submit through superintendent Radcliffe proposal for omission of this building from your contract.

The contractor immediately complied and notified all subcontractors having work to do on this building of the issuance of the stop order.

The stop order was issued pursuant to a Governmental policy of retrenchment in expenditures. The omission of Administration Building No. 1 was dependent upon the amount of savings thereby effected and not upon the absence of the building's usefulness.

The contractor submitted a proposal for omission of Building No. 1 and Corridors 1–2 to the defendant May 26, 1933, in detail, in the amount of a net deduction of $60,-873.00, the itemization thereof being summarized as follows:

Estimate of work if placed (allow)			$85,174.00
Salvage of used materials (allow)			803.00
			85,977.00
Less work completed (allow)	$21,830.00		
Less new work (allow)	3,274.00		
			25,104.00
Net credit			60,873.00

The omission of the building as a measure of economy was under consideration by the Government for some time. The Government finally decided to complete the project in its entirety and the following resolution was approved by the President July 18, 1933:

Resolution adopted by the Federal Board of Hospitalization, Washington, D. C., June 9, 1933

Whereas the President on May 26, 1932, approved a resolution of the Federal Board of Hospitalization dated May 18, 1932, in which it was recommended that a new Veterans' Administration hospital be erected at *San Francisco, California*, to include facilities for a regional office and diagnostic clinic at a cost for construction not to exceed $1,500,000, and

Whereas contracts for this construction involving commitments to the amount of $1,201,305.45 were awarded in January and February of 1933, and

Whereas approximately 10% of the construction provided for in these contracts has been completed, and

Whereas the Administrator of Veterans' Affairs has requested the Federal Board to give consideration to the advisability of proceeding with this construction in view of the probable effect of Public No. 2, dated March 20, 1933, and the regulations issued thereunder, upon the future hospital and domiciliary requirements of the Veterans' Administration, and

Whereas the Federal Board has given consideration to the structural suitability, the probably future need for, and the possible uses of the facilities now operated by the Federal Government in the general vicinity of San Francisco, and to the fact that even were the Veterans' Administration to send all of its general hospital cases to the Army, Navy, or Public Health Service hospitals it would still be necessary to provide facilities in San Francisco for the primary purposes for which the new hospital is being built, namely, to house the regional office of the Veterans' Administration now in leased quarters, and the diagnostic center now operated in connection with the Veterans' Administration neuropsychiatric facility at Palo Alto, California, and to serve as a clearing house for all types of cases developing in that area and requiring hospitalization or domiciliary care, and

Whereas the transfer of the San Francisco regional office to the new hospital will save the Federal Government $28,200 in rentals annually, while the removal of the diagnostic center from Palo Alto will permit the use of the space thus evacuated for neuro-psychiatric patients, for which type additional beds are badly needed in that area, and

Whereas the Federal Board is of opinion that it would cost the Federal Government from $400,000 to $500,000 to terminate this project, therefore, be it

RESOLVED, that the Federal Board of Hospitalization believes it to be in the interest of the Federal Government to carry to completion the construction of the new Veterans' Administration Hospital at San Francisco, California, and so recommends to the President.

(Signed) Frank T. Hines.
FRANK T. HINES, *Chairman.*

Approved:
FRANKLIN D. ROOSEVELT,
The President of the United States.
JULY 18, 1933.

Thereupon the contracting officer telegraphed the contractor July 27, 1933, the following:

> Reference our wire May eighth to discontinue immediately work on Administration Building Number One Fort Miley California stop it has been decided not to omit this building proceed with work in accordance with original plans stop request acknowledgment of this order to proceed.

Promptly thereafter work on Building No. 1 was resumed and eventually completed.

6. During the delay occasioned by the defendant's stop order on Buildings Nos. 1, 2, and 7, and work incident thereto, which also involved Building No. 3, the contractor gave prompt notice to the contracting officer that such delay was occurring, that damages therefor were accumulating, and that claim for such damages against the Government would be demanded.

July 29, 1933, the contractor applied to the contracting officer for an increase in contract price of $6,070.00 and an increase in contract time of 30 days, for delay in the erection of Building No. 1, and July 26, 1933, for an increase of $23,285.00 and an increase of 100 days, for delay in the work on Buildings Nos. 2, 3, and 7. These two claims aggregated $29,355.00 and were confined to field costs, job organization costs, and bond premium.

On the 19th of February 1934, the contractor submitted to the contracting officer a restatement of these two claims, consolidated, and in the increased amount of $33,859.05.

This claim had an added item of profit and was introduced with the following statement:

> In accordance with your instructions, we have waited to submit our final proposal for these costs until the field work chargeable to this delay had been completed and until the job organization costs could be accurately computed. The field work is now completed; our job organization costs can now be accurately computed. This proposal is, therefore, based on actual costs expended by us for field work and for job organization.

July 19, 1934, the contractor presented to the contracting officer a revised consolidated claim for costs occasioned by the 116-day delay on Buildings 1, 2, 3, and 7, in detail, and summarized therein as follows:

A. The field costs of reconditioning fabricated and erected forms; cleaning, rehandling, and transferring stored reinforcing steel; rehandling excavations; and the cost of excess materials	$11, 431. 10
B. The job organization costs of maintaining a complete construction organization, and the necessary equipment, etc., on this project for an additional 116 days	21, 212. 92
C. The bond premium on this additional work	566. 00
D. The Contractor's Job Overhead on this additional work	1, 143. 11
E. The Contractor's "Profit" on this additional work	3, 378. 71
F. The cost of maintaining the contractor's permanent contracting organization during the period of the delay	8, 630. 40
G. The loss of personal earnings and expenses of the principals under this contract during the period of the delay	12, 566. 28
Total cost of the 116-day Governmental delay	58, 928. 52

This last claim is embodied in the petition.

The contracting officer refused to pay any of these several claims and in communication to the contractor September 14, 1934, stated:

> The contract, while providing that you would not be charged liquidated damages for delays due to certain unforeseeable causes beyond the control and without

fault or negligence of the contractor, makes no provision for the payment by the Government of damages caused by such delays, and in the absence of such a provision, payment of the amount asked in addition to the contract price is considered by me to be unauthorized. If it is your desire to appeal to the head of the Department from this decision such appeal should be made by you direct.

The contractor prosecuted an appeal to the Director of the Veterans' Administration September 20, 1934. The head of that department sustained the action of the contracting officer August 3, 1935, in accordance with an opinion by the Comptroller General of the United States July 23, 1935, reported 15 Comp. Gen. 58, to whom the matter had been referred by the Veterans' Administration, and the claim of $58,928.52 has never been paid in whole or in part.

7. There was a delay of more than three months by reason of stop orders on Buildings Nos. 1 and 2 and work dependent thereon or incident thereto. The contracting officer ascertained 116 calendar days as the time which the contractor was delayed by the Government pending its decision regarding the changes in the various foundations and the possible elimination of the Administration Building No. 1. By reason of the delay thus caused on Buildings Nos. 1 and 2 and work dependent thereon or incident thereto the contractor of necessity suffered damages amounting to $25,142.42 classified as follows:

Field costs:

1. Labor expended in reconditioning forms, excavation, etc.	$3,257.01
2. Workmen's compensation and public-liability insurance on pay roll	238.35
3. Additional lumber	3,609.36
4. Rough hardware	539.50
5. Cleaning, sorting, rehandling, and transferring stored reinforcing steel	1,498.53
6. Trucking stored reinforcing steel	716.00
7. Extra cost of local reinforcing steel	204.00
8. Other miscellaneous expense	800.00

Job organization costs:

9. Salaries	6,677.54
10. Rental of equipment	2,656.00
11. Power and light	211.54
12. Water	298.33
13. Telephone and teletype	82.22
14. Telegrams	34.99
15. Stamps and stationery	52.99
16. Progress photographs	172.11
17. Workmen's compensation and public liability insurance on salaries	246.38
18. Fire, explosion, and earthquake insurance	740.63
General office overhead	3,106.94
	25,142.42

Other items sued for on account of the delays above mentioned are speculative and insufficiently proved. But for the period of such delay the foregoing expenses of $25,142.42 would not have been incurred.

8. On or about October 11, 1934, the contractor forwarded to the contracting officer bills against the United States for the balance due on the contract price, as modified by the change orders.

Thereafter from time to time the contractor pressed the Veterans' Administration for payment of this balance. The Veterans' Administration deferred payment for the purpose of considering the effect of a decision by the Secretary of Labor October 24, 1934, with respect to certain disputes which had arisen between workmen on the job and their employers over classification of laborers and mechanics and overtime pay. The dispute had been referred to the Secretary of Labor by the Veterans' Administration, and the determination of the Secretary of Labor was as follows:

> Pursuant to the request of the Veterans' Administration, I make the following determination, effective as of November 10, 1933 (the date the dispute was originally referred to me) of the rates of wages for work performed or to be performed in connection with the contract between the United States and the Herbert M. Baruch Corporation:
>
> (1) Carpenters are entitled to a minimum of $7.20 per eight hour day. The term carpenters embraces all

men whose duties in the course of employment requires the use of hammers, saws, or other carpenters' tools.

(2) When employed on Saturdays, Sundays, or holidays, carpenters and other mechanics are entitled to a minimum of double their ordinary rates for their respective classifications. So far as carpenters are concerned the "ordinary rate" is that fixed by paragraph (1).

(3) Laborers employed in connection with building operations are entitled to a minimum of $5.00 per day regardless of whether they are classified as building or common laborers. This is not intended to be taken as a finding as to what the prevailing rate of wages for laborers is in San Francisco, but merely as a finding on the prevailing practice in the classification of laborers.

(4) When employed on Sundays or holidays laborers are entitled to a minimum of double their ordinary rate. So far as laborers employed in connection with building operations are concerned "ordinary rate" is that fixed by paragraph (3).

November 17, 1934, the Administrator, Veterans' Administration, submitted the final vouchers to the Comptroller General for settlement.

November 19, 1934, the contractor's attorney advised the head of the Veterans' Administration in part as follows:

> In behalf of the contractors I wish to invite your attention particularly to their statement that should their final payment be withheld from them any longer they feel they should be compensated for the losses or damages that may be suffered by reason thereof, and as directed by the contractors hereby give you notice to that effect, namely, that they will expect compensation for the losses suffered on account of the unreasonable delay in making final payment.

The final vouchers, so submitted, were certified by the Comptroller General January 25, 1935, for payment in full, without application of the decision of the Secretary of Labor, and they were paid in due course.

There is no proof that payment of the vouchers was unreasonably delayed.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

On January 12, 1933, the plaintiffs entered into a contract with the defendant, by the terms of which plaintiff agreed to furnish all labor and materials and perform all work required for wrecking and removing old buildings and constructing 17 new buildings for the Veterans' Administration at San Francisco, California, and for the reconditioning and rebuilding of two other structures, including fences, gates, roads, walks, grading and drainage. It was known as the Fort Miley project. The consideration was to be $898,810. The date fixed for the completion of the contract was April 4, 1934.

During the progress of the work numerous change orders were issued by the contracting officer pursuant to the provisions of article 3 of the contract. These change orders had the effect of increasing the contract price to $928,976.65 and of postponing the date of completion to June 27, 1934.

Most of these changes were adjusted both as to time for completion and increase or decrease in cost in the manner specified in the various provisions of the contract.

The substantial features of this case turn on two propositions:

1. Plaintiffs' claim for damages because of defendant's order to stop the foundation work on Building No. 2 pending a decision regarding the necessary alterations in the specifications.

2. Plaintiffs' claim for damages caused by the defendant's order to stop work on Building No. 1 pending a decision as to whether such building should be eliminated entirely from the contract.

The first of these claims is based on the fact that while the excavation work was in progress for the foundation of the Main Building No. 2, what was apparently a dike of rock was encountered extending upward in the area designed for the sub-basement, which rock had escaped previous exploratory borings for the Government. The building had been designed to rest on hard blue clay through which the unexpected dike projected. Defendant's superintendent of construction on March 21, 1933, ordered excavation in the extreme east end of the east wing stopped in

order that the proper investigation might be made and the footings redesigned. Later, on April 25, 1933, foundation work was ordered discontinued on other portions of the building because seven-day cylinder tests of samples of the concrete being poured did not come up to the standard required. However, core borings which were then made indicated that the concrete was satisfactory. The supposed dike or pinnacle of rock in the center of the building required detailed investigation and study and was finally determined to be a large boulder entirely submerged in blue clay. Load-bearing tests in addition to those already made were found necessary and the plaintiffs were given this work to do by separate contract. On July 21, 1933, the contracting officer authorized the plaintiffs to resume work on the foundation of Building No. 2.

In its proposal the contractor reserved claim for damages for delay occasioned by inability to work while the changes were under consideration. These claims were duly presented.

Defendant claims that under the terms of the contract no provision was made for the payment of damages by the Government caused by delay and that in the absence of such a provision payment of the amount asked in addition to the contract price was unauthorized. This is true as to ordinary changes, but where extra costs are incurred by contractor due to unforeseen or unknown conditions in construction or excavating foundations for buildings, the changes thereby required are not necessarily reasonable changes contemplated in the contract. Under the previous decisions of the court the plaintiffs may recover the actual costs thus incurred. *Siesel Co.* v. *United States*, 90 C. Cls. 582; *Rust Engineering Co.* v. *United States*, 86 C. Cls., 461, 475. From the latter decision we quote as follows:

> The changes made necessary by reason of the conditions encountered in excavating for the foundation of the building were not reasonable changes within the scope of the drawings and specifications as contemplated in Art. 3 of the contract, but represented important changes based upon changed conditions which were unknown and materially different from those shown on

the drawings or indicated in the specifications. Such changes were, therefore, clearly not within the contemplation of either party to the contract at the time it was made. On the facts disclosed plaintiff is entitled to recover on this item.

We find as a fact that the changes made necessary by reason of the conditions encountered in excavating for the foundation of Building No. 2 were not reasonable changes within the scope of the terms of the contract and specifications, but were important changes that were not within the contemplation of either party to the contract at the time it was made.

As to the second proposition: On May 8, 1933, the contractor received from the contracting officer the following telegram:

> Reference contract construction San Francisco California discontinue immediately work on administration building number one (stop) prepare and submit through Superintendent Radcliffe proposal for omission of this building from your contract.

The contractor complied and submitted a proposal for omission of Building No. 1 and Corridors 1–2.

The omission of the building as a measure of economy was under consideration by the Government for some time.

On July 27, 1933, the contracting officer sent the contractor the following telegram:

> Reference our wire May eighth to discontinue immediately work on Administration Building Number One Fort Miley California stop it has been decided not to omit this building proceed with work in accordance with original plans stop request acknowledgment of this order to proceed.

Manifestly this delay was not in the contemplation of the parties at the time of the making of the contract. It was done pursuant to a policy of economy which the defendant determined upon after the making of the contract. It was not the fault of the contractor and he had no part in such determination. He should be permitted to recover the actual and necessary costs proximately flowing from the delay that was occasioned by this action on the part of the defendant.

On July 19, 1934, the contractor presented to the contracting officer a revised consolidated claim totaling $58,-928.52 which he asserted was the direct result of the delays occasioned by the defendant in the construction of Buildings 1, 2, 3, and 7. The contracting officer declined to consider this claim on the ground that the contract did not authorize damages for delays. His action was approved by the Director of the Veterans' Administration.

Article 3 of the contract provides for changes and reads as follows:

> The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and (or) specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within ten days from the date the change is ordered, unless the contracting officer shall for proper cause extend such time, and if the parties can not agree upon the adjustment the dispute shall be determined as provided in Article 15 hereof. But nothing provided in this Article shall excuse the contractor from proceeding with the prosecution of the work so changed.

Article 4 of the contract provides for changed conditions and reads as follows:

> Should the contractor encounter, or the Government discover, during the progress of the work, subsurface and (or) latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they materially differ from those shown on the drawings or indicated in the specifications, he shall at once, with the written approval of the head of the department or his representative, make such changes in

the drawings and (or) specifications as he may find necessary, and any increase or decrease of cost and (or) difference in time resulting from such changes shall be adjusted as provided in Article 3 of this contract.

Article 15 of the contract provides that all the disputes concerning questions of fact arising under the contract should be decided by the contracting officer, subject to written appeal by the contractor within thirty days to the head of the department concerned.

The time for completion of the contract was extended but the facts in connection with the claim for damages were not passed upon by the contracting officer. Plaintiffs were entitled to have action taken on the merits of their claim for the extra costs incurred. *Siesel Co.* v. *United States*, *supra*.

Certainly plaintiffs should be entitled to "equitable adjustment" in a case where as in Main Building No. 2 the foundation placement was so difficult and different from that contemplated that the entire building had to be swung around and the contracting officer found it necessary to order work suspended for several months.

It is unthinkable that the plaintiffs should suffer the entire damages brought about by the stop order on the Main Administration Building No. 1 when such order was issued by the defendant wholly for its own benefit.

It has been rather difficult to segregate the items of cost and to determine which were actually expended in connection with Buildings 1 and 2. The record is voluminous. A number of the change orders were the natural ones usual in construction of this kind. We have eliminated the items that are linked to these changes.

The testimony shows that Buildings 1 and 2 constituted more than one-half of the total work involved in the contract. We have included the items of actual expense which the evidence clearly shows were attached to these two buildings and which were made necessary because of the delay in the construction of each of such buildings. We have eliminated items which the testimony shows to be in doubt.

It has been necessary to apportion some of the items of cost which attached to the entire contract and to allot the proper part of these items to Buildings 1 and 2 and work dependent thereon and incident thereto.

As to the general office overhead, the evidence shows that the plaintiff company engaged in other construction work at the time the contract work involved in this litigation was being done. These, however, were comparatively small contracts and the total of these outside contracts amounted to only about $500,000 during this period. This appeared to be about the usual amount of outstanding contracts.

We have, therefore, apportioned the general office overhead and allotted the proper part of same to this particular contract. In turn, we have allotted the proper part of the net result thus obtained to the unforeseen delay in connection with the construction of Buildings 1 and 2.

The amount of all these items has been limited to the period of unforeseen and uncontemplated delay in connection with Buildings 1 and 2. The actual expenditures directly resulting from the stop orders on Buildings 1 and 2 and work dependent thereon or incident thereto totalled $25,142.42.

Plaintiff also claims damages for delay in payment. On October 11, 1934, the contractor forwarded to the contracting officer a claim against the United States for the balance due on the contract price as modified by the change orders.

It was necessary to consider the effect of a decision by the Secretary of Labor of October 24, 1934, with respect to certain disputes which had arisen between workmen on the job and their employers over classification of laborers and mechanics and overtime pay. Final vouchers covering payment in full were certified by the Comptroller General January 25, 1935.

There is no proof that payment of the vouchers was unreasonably delayed.

Plaintiff is entitled to judgment in the sum of $25,142.42. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

RALPH H. COLEMAN, TRUSTEE FOR WILOIL CORPORATION, BANKRUPT, v. THE UNITED STATES

[No. 43609. Decided March 3, 1941]

On the Proofs

Excise tax on gasoline under the Revenue Act of 1932.—Where the taxpayer corporation, of which plaintiff is trustee in bankruptcy, between February 11, 1933, and March 6, 1934, sold to a railroad company a quantity of "casing-head or natural gasoline" for the specified use of said railroad company in melting snow and ice from its railroad switches and frogs; and where said "casing-head" gasoline was not used as a fuel nor was it suitable for that purpose; it is *held* that the said sale of such "casing-head" gasoline was not subject to the excise tax on "gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motorboats, or aeroplanes," imposed by section 617 of the Revenue Act of 1932, and the plaintiff is entitled to recover.

Same; meaning of statutory words.—Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them.

Same; judicial notice of common word usage.—The Court takes judicial notice that the term "gasoline" is universally understood throughout this country to mean a liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motorboats, or airplanes.

Same.—The term "gasoline" as ordinarily understood would not include casing-head or natural gasoline, which in its usual sense would have quite a different meaning.

Same; punctuation.—Punctuation is seldom conclusive and is often disregarded in order to fix the true meaning, "punctuation is no part of the statute." *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84 quoted.

Same; consideration of subsequent legislation.—Where several acts of Congress are passed relating to the same subject matter, subsequent legislation may be considered to assist in the interpretation of the prior legislation. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306, cited.

Same; ambiguity of statute.—Where a tax statute is ambiguous and of doubtful meaning, the doubt must be resolved in favor of the taxpayer.

The Reporter's statement of the case:

Mr. Meredith M. Daubin for the plaintiff. *Mr. Homer L. McCormick* was on the brief.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Wiloil Corporation (hereinafter referred to as the "corporation") is a Pennsylvania corporation, with its principal place of business in Pittsburgh. On July 10, 1939, it was adjudged bankrupt by the District Court of the United States for the Western District of Pennsylvania, in a proceeding entitled "In the Matter of Wiloil Corporation, a Pennsylvania corporation, Bankrupt, No. 20588 in Bankruptcy," and Ralph H. Coleman, plaintiff, was appointed trustee.

2. During 1932, 1933, and 1934 the corporation was engaged in the business of buying and selling natural or casing-head gasoline, and also blending it with other gasolines to produce commercial grades of motor fuels.

3. Between February 11, 1933, and March 6, 1934, the corporation sold to the New York Central Railroad Company 228,985 gallons of casing-head or natural gasoline, for the specified use by the Railroad Company in melting snow and ice from its railroad switches and frogs. The gasoline was not used as a motor fuel, nor was it suitable for that purpose.

4. The natural gasoline so sold to the New York Central Railroad Company was shipped direct from the producer to the railroad company, with nothing added. The railroad company's specifications required a gasoline of 26 pounds Reid vapor pressure per square inch at 100 degrees Fahrenheit. The gasoline delivered tested 23 to 26 pounds per square inch, had an initial boiling point of 50 to 60 degrees Fahrenheit, with a final boiling point of 250 to 280 degrees Fahrenheit, and a gravity ranging from 83 to 85.

5. The Commissioner of Internal Revenue assessed an excise tax on the corporation's sales of natural gasoline to

the New York Central Railroad Company under the provisions of section 617 of the revenue act of 1932, in the amount of $2,813.32. This tax, together with interest of $684.88, was paid by the corporation on April 12, 1937. The tax was borne entirely by the corporation, and the latter was not reimbursed therefor by the railroad company.

6. On August 5, 1932, the Commissioner held that:

> "Natural Gasoline" which has not reached a stage of compounding, blending or processing whereby it is suitable for use as a fuel for the propulsion of motor vehicles, motor boats or aeroplanes is not subject to the tax.

But subsequently another Commissioner of Internal Revenue held that:

> * * * the tax imposed by section 617 of the Revenue Act of 1932 is applicable to sales of all products commonly or commercially known as gasoline or benzol, including natural or casing-head gasoline and industrial benzol, regardless of classification or use.

7. On May 24, 1937, the corporation filed a claim for refund of the gasoline taxes and interest so paid, upon the ground that:

> The taxes in question were assessed on sales of casing-head gasoline (or "snow-melting oil") for use by the New York Central Railroad in melting snow and ice. The Wiloil Corporation urges that the casing-head gasoline (or "snow-melting oil") was not a taxable "gasoline" during the period in question.

By letter of July 7, 1937, the Commissioner of Internal Revenue rejected the corporation's claim.

8. Casing-head or natural gasoline is separated from the gas coming from certain wells. The gas may be obtained either from a well that produces oil or one that does not. It was first known as casing-head gasoline because it was separated from gas issuing from the casing-head of an oil well. It was later produced from natural gas wells—where no oil was produced—and therefore became known as natural gasoline, a broader term.

Natural gasoline ordinarily has a gravity of 80 to 93; an initial boiling point of 50 to 60 degrees Fahrenheit; a final

boiling point (complete evaporation) of around 250 to 280 degrees Fahrenheit; and a Reid vapor pressure test varying from 10 to 34 pounds. Ordinary motor fuel gasoline has an average gravity of 60 to 64; an initial boiling point of 80 to 100 degrees; a final boiling point of 350 to 400 degrees; and a Reid vapor pressure test of 4.9 to 10.3 pounds.

9. Natural gasoline was not suitable for use alone as a motor fuel for the propulsion of motor vehicles, motor boats and airplanes in the years 1932, 1933 and 1934, its chief use being as a blending agent with heavier, less volatile gasolines to produce such motor fuel. One difference between natural gasoline and the gasoline used as a motor fuel is in the vapor pressure. Both are composed of hydrocarbon compounds. The primary constituents of natural gasoline are propane, butane and pentane, with some ethane. Ordinary refinery gasoline consists primarily of butane, pentane and hexane.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff in this case is the trustee of the Wiloil Corporation, a bankrupt, which is referred to in the opinion as the "corporation". He seeks to obtain a refund of taxes assessed and paid under section 617 of the act of 1932 which, after making provision for the imposition of a tax on gasoline sold by the importer thereof or by a producer of gasoline, provided in part as follows:

> (c) (2) The term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes. (47 Stat. 169, 267.)

The report of our commissioner states that the Commissioner of Internal Revenue assessed an excise tax of $2,813.32 on a sale by the corporation to the New York Central Railroad Company of what is specifically designated as casing-head or natural gasoline under the provisions of section 617 of the revenue act of 1932, which tax was paid by the corporation on April 12, 1937, together with interest in the sum of $684.88. A timely claim for refund was filed,

and rejected by the Commissioner of Internal Revenue. Thereupon the corporation instituted this suit on the ground stated in the claim that "casing-head gasoline (or 'snow-melting oil') was not a taxable 'gasoline' during the period in question". The evidence shows that the natural gasoline was sold for the specified use by the railroad company for melting snow and ice from its railroad switches and frogs and that it was not suitable for use alone as a motor fuel, its chief use being as a blending agent with heavier and less volatile gasolines for motor fuel purposes. The case turns on the question of whether the liquid so sold was subject to the tax and this depends on the construction of the statute.

We find nothing in the evidence which shows definitely the amount of the tax assessed and interest paid by the corporation. The plaintiff in argument, however, concurs in the finding made by the commissioner of this court with respect to the amount so paid and counsel for defendant ask that it be adopted. We therefore conclude that the parties are in agreement that the correct amount is stated in the report of our commissioner and have so fixed it in our findings.

A controversy arises in the case over the meaning of that portion of the statute which is quoted above and involves the proper construction thereof. The plaintiff in argument contends that the liquids taxed under the provision quoted above must be those "the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes." The defendant, on the other hand, argues that such a construction implies a comma after the word "liquid" in the statute, and that as no such comma is found the chief use test contended for by plaintiff is not warranted. It is specially contended on behalf of the defendant that the word "gasoline" as used in the statute includes casing-head or natural gasoline the sale of which was made subject to the tax by the Commissioner. For several distinct reasons we think the construction placed upon the statute by defendant is incorrect.

In determining the intent of Congress the language used must first be considered. Statutory words are uniformly

presumed, unless the contrary appears, to be used in their ordinary and usual sense and with the meaning commonly attributed to them. See *Caminetti* v. *United States*, 242 U. S. 470. The dictionary definition of gasoline is "a volatile, inflammable hydrocarbon mixture used as a fuel, especially for internal-combustion engines." Some other uses are mentioned in the dictionary, but we think it is quite clear that this definition does not include casing-head or natural gasoline which could not be used as a fuel for internal-combustion engines. Besides this, we think the court can take judicial notice that the term "gasoline" was universally understood throughout this country to mean a liquid the chief use of which was as a fuel for the propulsion of motor vehicles, motor boats, or airplanes. It referred to a commodity which was sold by that name on every highway and at numerous stations in every town and city throughout the country. We do not think any court would hold that if a purchaser ordered a quantity of gasoline the seller could fill that order by supplying casing-head or natural gasoline, which could not be used for the same purposes as gasoline. In fact, we think the meaning of the order would be so plain that no seller would attempt to do anything of that kind. It should be specially noted in this connection that casing-head or natural gasoline and gasoline, as shown by the findings, are different compounds in that each contains a substance not found in the other and each is lacking in a substance which the other contains. The uses of each are different from those of the other and there are other differences in their properties as shown by the findings. The term "gasoline" as ordinarily understood would not include casing-head or natural gasoline, which in its usual sense would have a quite different meaning. Evidently this was the meaning ascribed to the term "gasoline" by the Federal Commissioner who first passed upon it and, if correct, this is sufficient by itself and alone to prevent the application of the tax to "casing-head or natural gasoline."

A separate dispute is as to whether the words "any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes" are used as descriptive of the liquids to which the statute applies. As

above stated, it is argued that the construction contended for by plaintiff would require, for correct punctuation, a comma after the word "liquid." We do not think this follows, or if it did, that the circumstance would be conclusive against the plaintiff. A common use of the word "other" is as meaning one of two or more of a class. If the construction contended for by defendant had been intended by Congress, we think this part of the statute would have read "and any liquid the chief use of which is as a fuel," etc., leaving out the word "other" which connects the fuels described in the last class with the two first mentioned. Punctuation is seldom conclusive and is often disregarded entirely in order to fix the true meaning. In the case of *Hammock* v. *Loan and Trust Co.*, 105 U. S. 77, 84, it was said: "Punctuation is no part of the statute." We think the clause which we are now construing would be generally understood to be so connected with the term "gasoline" as to be descriptive of a class to which the tax applied, and if the argument of defendant fails in this respect the defense fails entirely.

What we have said above is sufficient to dispose of the case but there is another matter which it is important to consider although it is not in itself and alone controlling.

We think the rule is well established that where several acts of Congress are passed relating to the same subject matter, subsequent legislation may be considered to assist in the interpretation of the prior legislation. *Tiger* v. *Western Investment Co.*, 221 U. S. 286, 306. The reasons for this rule are manifest. Both the House and Senate Committees which present legislation to Congress for adoption are provided with assistants from outside who are not only of proved legal ability but by long experience become experts in the matter of drafting legislation. These assistants are called legislative counsel. As to the policy of the laws, they are under the control of the committee with which they are working, and in drafting statutes their work is merely to put in proper form the intentions of the lawmakers. As a rule these assistants also prepare the committee reports on complicated or technical legislation in accordance with general instructions from the committee. A consideration of their work when revising a prior statute furnishes, we think, a valuable aid in interpreting the prior act.

The Commissioner of Internal Revenue who first made a ruling construing the act of 1932 under which the tax in controversy was imposed held that natural or casing-head gasoline was not subject to the tax, but subsequently another Commissioner held that sales thereof were taxable regardless of classification or use. When the 1934 act was adopted, section 603 thereof, after making provision for the imposition of a tax on gasoline sold by the importer thereof or by a producer of gasoline, changed the definition of gasoline as contained in section 617 of the 1932 act (as quoted above) and made a new statutory definition as follows:

> (c) (2) The term gasoline means (A) all products commonly or commercially known or sold as gasoline (including casing-head and natural gasoline), benzol, benzene, or naphtha, regardless of their classifications or uses; and (B) any other liquid of a kind prepared, advertised, offered for sale or sold for use as, or used as, a fuel for the propulsion of motor vehicles, motor boats, or airplanes; except that it does not include any of the foregoing (other than products commonly or commercially known or sold as gasoline) sold for use otherwise than as a fuel for the propulsion of motor vehicles, motor boats, or airplanes, and otherwise than in the manufacture or production of such fuel, and does not include kerosene, gas oil, or fuel oil. (48 Stat. 680, 765.)

It will be noted that this provision of the statute specifically includes casing-head and natural gasoline.

The House Report on the Bill expressly stated:

> The definition of "gasoline" is changed by eliminating the test of whether the commodity is chiefly used as fuel for motor vehicles, motor boats, or airplanes, and making the term inclusive of all commodities sold or used for that purpose. Lack of proof of quantities used for different purposes has made the "chief use" test impossible of satisfactory administration.[1]

The conference report of the House of Representatives on the Bill as agreed to also stated:

> (5) The definition of gasoline was broadened to include all naphtha and to include all liquids prepared,

[1] See House of Representatives Report No. 704, Seventy-third Congress, Second Session. Published in Internal Revenue Cumulative Bulletin 1939–1, Part 2, page 568.

> advertised, offered for sale, or sold for use as, or used as, fuel for the propulsion of motor vehicles, motor boats, or airplanes, *regardless of the chief use.* [Italics inserted.][2]

It appears very plainly that when Congress had this matter before it in 1934 it considered that the act of 1932 applied only to liquids "the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes," and that this definition was not broad enough for the reason as stated in the report that the "chief use" test was impossible of satisfactory administration. Congress therefore amended the act so as to make the term "gasoline" specifically include casing-head and natural gasoline. A better example of how the prior act was understood can hardly be found. The 1934 act and the reports of Congress on the Bill showed plainly that Congress did not think that when the words of the 1932 act were considered in their ordinary and usual sense, casing-head or natural gasoline was taxable. We think this action of Congress tends to show not only how Congress understood the 1932 act but how it would be understood by the public generally, and in this way aids in determining the true meaning of its language.

Even if some question should still remain after what has been said above with reference to the construction of the statute, we think it must be conceded at the very least that the statute is ambiguous and of doubtful meaning, in which event the doubt must be resolved in favor of the taxpayer.

It follows that the plaintiff is entitled to recover the amount of tax paid on natural gasoline as shown by the findings, with interest as provided by law. Judgment will be entered accordingly.

Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

Jones, *Judge*, dissenting:

I am unable to agree with the court's disposition of this case.

[2] See Conference Report to House of Representatives No. 1385, Seventy-third Congress, Second Session. Published in Internal Revenue Cumulative Bulletin 1939–1, Part 2, page 639.

The applicable parts of section 617 of the Revenue Act of 1932 (47 Stat. 169, 266, 267) are as follows:

> TAX ON GASOLINE:
>
> (a) There is hereby imposed on gasoline sold by the importer thereof or by a producer of gasoline, a tax of 1 cent a gallon, * * *.
>
> (c) As used in this section—
>
> (1) the term "producer" includes a refiner, compounder, or blender, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer.
>
> (2) the term "gasoline" means gasoline, benzol, and any other liquid the chief use of which is as a fuel for the propulsion of motor vehicles, motor boats, or aeroplanes.

It seems clear from the language used that Congress meant to impose a tax on the sale by the producer or importer of all gasoline plus all benzol plus any other liquid the chief use of which is as a motor fuel.

The chief use test applies only to other liquids. Its effect was to include other natural or synthetic products generally used as a motor fuel and to exclude other liquids not commonly used for motor propulsion.

Any other construction runs into difficulties. For example, the chief use of benzol is as an industrial solvent rather than as a motor fuel. It is used much less than is natural or casinghead gasoline in blending as a motor fuel. If the chief use test applies to gasoline it must apply to benzol. It seems improbable that Congress would name a specific commodity like benzol to be taxed and in the same sentence eliminate it by the chief use test.

If the construction claimed by plaintiff is correct the definition need not have specified any article, but might simply have said "Gasoline means any fluid the chief use of which is as a motor fuel."

The changes in the 1934 act are cited. Changes or comments by a later Congress would be persuasive if the language used by a previous Congress were not clear. The language of the early act seems clear. Congress, in order to raise revenue, found it necessary to search for things to

tax. It named two articles, and then added a clause to cover other articles. This seems the natural conclusion.

But even if the later changes are considered, Congress simply broadened the definition and made it more inclusive. In addition to specifically naming gasoline and benzol, it also specifically named benzine and naphtha. Then in the second subdivision of the same sentence it included other articles offered for sale or sold as a fuel for the propulsion of motor vehicles. The House report in explaining the elimination of the special use test used the following language:

> Lack of proof of quantities used for different purposes has made the "chief use" test impossible of satisfactory administration.

In other words, the changes seem to be made primarily to increase the number of articles taxed and enlarge the field of operation. The term "chief use" was deleted not for the purpose of explaining or clarifying language, but for the purpose of eliminating administrative difficulties.

However, if the chief use test as used in the act of 1932 were construed to apply to the term gasoline, it is doubtful if plaintiff should be permitted to recover the tax. The evidence shows that by far the greater portion, probably more than 90%, of natural or casinghead gasoline is used as a motor fuel by blending with heavier gasoline. It was so used in 1932, and prior thereto. It is called gasoline. It is gasoline, and its chief use is the blending with heavier gasoline for the purpose of making fuel for the propelling of motor vehicles.

Even if the "chief use" should be held to apply the decision should turn not upon the purpose for which the special gasoline in this particular case was sold, but upon the chief use made of the article generally.

FIREMAN'S FUND INDEMNITY COMPANY, A BODY CORPORATE, v. THE UNITED STATES

[No. 43306. Decided March 3, 1941]

On the Proofs

Government contract; completion of contract by surety.—Where a contracting concern entered into a contract with the Government to furnish all labor and material and perform all work required for the complete installation of an extension to the existing steam heating plant and installing a new steam distribution system at the Naval Ammunition Depot, Fort Mifflin, Pa., and the plaintiff as surety executed a completion bond for the contract; and where the defendant before completion terminated the contractor's right to proceed and called upon plaintiff to complete the contract, and plaintiff did complete said contract; and where in final settlement a voucher for payment to the plaintiff was approved by the Navy Department and forwarded to the General Accounting Office, and where payment of said voucher was withheld by said General Accounting Office pending settlement of a suit by the contractor in the Court of Claims against the defendant for said amount; it is *held* that plaintiff is entitled to recover.

Same; liquidated damages from completing surety.—Where the Government, before the time was up, terminated the contractor's right to proceed and engaged another party to complete the contract, it is *held* that the defendant was not entitled to collect from surety completing the contract liquidated damages for the delay, and plaintiff is entitled to recover.

Same; penalty for overtime.—Where the statute specifically provided that a penalty should be assessed against a contractor for working men in excess of 8 hours per day, and where the amount of said penalty was deducted from the payment made in final settlement; it is *held* that the presumption is that the public officials assessing said penalty acted in accordance with the statute in making such assessment and it was for the plaintiff to show by evidence that the deduction so made was not authorized.

Same; payment of just and reasonable wages; amounts withheld.—Where the contract provided that all employees on the work should be paid "just and reasonable wages," and where it was further provided that the contracting officer might withhold from the contractor so much of accrued payments

as might be necessary to pay to laborers or mechanics so employed the difference between the rate of wages required by the contract and the rate of wages actually paid to such laborers and mechanics; it is *held* that in the absence of any proof to show what amount was paid to the workmen so employed plaintiff is not entitled to recover.

The Reporter's statement of the case.

Mr. P. J. J. Nicolaides for the plaintiff. *Mr. William F. Kelly* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. Plaintiff is a corporation organized under the laws of the State of California and is engaged in the bonding and insurance business with its principal office in the City of San Francisco, California, with a branch office in New York City.

2. On October 17, 1933, the Continental Contracting Co., Inc., hereinafter referred to as the contractor, a corporation, entered into a contract (NOy–1924) with the defendant, whereby it undertook to furnish all labor and material and perform all work required for the complete installation of an extension to the existing steam-heating plant and installing a new steam distribution system at the Naval Ammunition Depot, Fort Mifflin, Pennsylvania, as contemplated by Item 1, Paragraph 1 17–02 of Specification No. 7097, as amended by Addendum No. 1 thereto, for a consideration of $56,990, to which were added certain Change Orders, making the total contract price $60,707.56, a copy of which contract is attached to the petition as Exhibit "A" and is made a part hereof by reference.

3. On October 20, 1933, the contractor, as principal, and the plaintiff, as surety, executed a performance bond in favor of the United States in the penal sum of $28,500, whereby they jointly and severally bound themselves unto the United States for the faithful performance of said contract.

4. The work on this contract was to commence within ten (10) calendar days after date of receipt of notice to proceed and to be completed within two hundred (200) calendar days

from the date of receipt of notice to proceed, that is, on or before May 18, 1934. Thereafter, by Change Order "A" dated June 9, 1934, the time for completing this contract was extended twelve (12) days, that is, to and including May 30, 1934. Thereafter, by letter dated July 6, 1934, the time for completing this contract was extended twenty-four (24) days, that is, to June 23, 1934 and, thereafter, by Change Order "B" dated March 19, 1935, the time for completing this contract was extended one hundred and eight (108) days, that is, to October 9, 1934.

5. On August 1, 1934, the work under the contract not having been completed, the defendant, pursuant to the terms of the clauses in Article 9, notified the contractor that its right to proceed with the work was terminated.

6. On August 1, 1934, the defendant sent the plaintiff a letter to which was attached a copy of its letter of the same date to the contractor, requesting plaintiff to complete the work under the contract.

Pursuant to this request, plaintiff took charge of the work and completed it to the satisfaction of defendant.

7. On August 1, 1934, the contractor had been paid on account of the contract the sum of $32,654.25.

8. The work provided for in the original contract between the contractor and the United States was completed by the plaintiff on December 8, 1934, which was sixty (60) days after the time provided for completion in the original contract between the contractor and the United States and the extensions thereof.

9. After the plaintiff herein undertook the completion of the work on August 1, 1934, all payments were made direct to it which totalled the sum of $13,340.42, leaving still unpaid under the contract, as increased, the sum of $14,712.89.

10. The plaintiff in completing the contract expended a sum in excess of $28,053.31, on account of which it has been paid by the defendant the sum of $13,340.42, sustaining an actual loss in excess of $14,712.89 in completion of the contract.

11. Upon completion of the work by the plaintiff, the Navy Department on June 3, 1935, prepared a final voucher for payment to the plaintiff in the sum of $10,312.48, after

having made the following deductions: $130 penalty assessed against the Continental Contracting Company for working men in excess of eight (8) hours; $1,270.41 wage claims due to workmen by the contractor and the sum of $3,000 as liquidated damages for sixty (60) days delay in completing the contract at the rate of $50 per day. The item of $1,270.41 and $45 of the item of $130 are included in the suit of the Continental Contracting Company, No. 43163, in the Court of Claims. The plaintiff signed the voucher to which was attached a rider, reserving to itself the right to file claim for the foregoing deductions as well as for extras claimed to be due it in the sum of $2,286.23. Plaintiff herein waives claim for said extras. The voucher was approved for payment on August 7, 1935 by the Navy Department in the sum of $10,312.48 and on September 18, 1935, was forwarded to the General Accounting Office for direct settlement. On March 18, 1936, the Comptroller General notified the plaintiff that settlement would not be made while the claim of the contractor, No. 43163, was pending in the Court of Claims.

12. The contract provided, among other things, in Article 16 (e):

> ART. 16. (e) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers and mechanics.

The contract otherwise required that all employees on the work should be paid just and reasonable wages and that skilled labor should be paid not less than $1.20 per hour and unskilled labor not less than $0.50 per hour.

The court decided that the plaintiff was entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

This is a suit to recover the balance, amounting to $14,712.89, withheld by the defendant upon a completed construction contract with the United States.

The Continental Contracting Company, Inc., entered into a contract with the defendant on October 17, 1933, for the installation of an extension to the existing steam heating plant and installing a new steam distribution system at the Naval Ammunition Depot, Fort Mifflin, Pennsylvania, the contract price with extras amounting to $60,707.56. The plaintiff executed a surety bond for the purpose of the contract in the sum of $28,500.00. The time for completion of the contract was originally May 18, 1934, but by reason of change orders it was extended to October 9, 1934.

Defendant becoming dissatisfied with the manner of the contractor's performing the work, on August 1, 1934, terminated the contractor's right to proceed and called upon the plaintiff for the completion thereof, at which time there was unexpended on the contract the sum of $28,053.31.

Plaintiff completed the work to the entire satisfaction of the defendant and in so doing expended a sum in excess of $28,053.31, but received from the defendant on account thereof only $13,340.42, leaving on hand unexpended the sum of $14,712.89 and causing the plaintiff to sustain a loss in excess of that amount in completing the contract. The suit is to recover the unexpended balance of the contract price.

The contract which is the subject matter of this suit is also the subject matter of another case pending in this court, No. 43163. The defendant in making payment on the contract failed to pay:

(1) $10,312.48, the payment of which was approved August 7, 1935, by the Navy Department, and on September 18, 1935, forwarded to the General Accounting Office for direct settlement;

(2) $3,000.00 deducted by the Navy Department from the final voucher as liquidated damages for sixty days' delay in completing the contract at the rate of $50.00 per day;

(3) $130.00 penalty assessed against the Continental Contracting Company for working men in excess of eight hours.

(4) $1,270.41 wage claims alleged to be due to workmen by the contractor.

There is no dispute between the parties but that the plaintiff is entitled to recover the sum of $10,312.48. The only

reason that amount has not been paid is assigned in a letter to the General Accounting Office, stating that the Continental Contracting Company has filed a suit against the defendant for this amount and that no settlement can be made of this claim so long as the suit of the Continental Contracting Company is pending. Manifestly, this is not a good defense and this is conceded.

The defendant also has withheld $3,000.00 as liquidated damages for sixty days' delay which occurred in completing the contract; but the defendant, having before the time was up, terminated the contractor's right to proceed and engaged another party to complete the contract, cannot recover liquidated damages for the delay. (See *The Fidelity and Casualty Company of New York* v. *United States*, 81 C. Cls. 495, and *Commercial Casualty Insurance Company, a Corporation*, v. *United States*, 83 C. Cls. 367.) Counsel for defendant, in effect, concede that these decisions are adverse. Plaintiff, therefore, will also be entitled to recover on this matter.

As before stated, a third deduction that the defendant made in paying the plaintiff was $130.00, a penalty assessed against the Continental Contracting Company for working men in excess of eight hours, and the fourth deduction was the sum of $1,270.41 for "wage claims due to workmen by the contractor."

There is no evidence as to what the facts were with reference to any of the employees being worked over eight hours, or as to whether any of the workmen were not paid the full amount due them. The allowance of these items depends on whether there is any presumption, in the absence of evidence, that the acts of the Government officials in making the deductions were justified by the facts. The argument of the plaintiff assumes that there was a certain amount due on the contract when completed which is not affected by violation of the contract by the original contractor with respect to the two items mentioned above. This, we think, is erroneous. So far as the deduction on account of working overtime is concerned, the law specifically provided that it should be withheld. In making the deduction, defendant's officials purported to act in accordance with the law, and being pub-

lic officials we think the presumption in the first instance is that they did act in accordance with the statute in making the deduction and that it was for the plaintiff to show that the deduction was not authorized. Having failed to do this, it cannot recover on this item.

With reference to the deduction of $1,270.41 for wage claims due workmen by the contractor, the case is different. This deduction was not made under any statute but under the contract which provided that all employees on the work should be paid just and reasonable wages and that skilled labor should be paid not less than $1.20 per hour and unskilled labor not less than $0.50 per hour. The contract also contained the following provision:

> ART. 16. (e) The contracting officer may withhold from the contractor so much of accrued payments as may be necessary to pay to laborers or mechanics employed by the contractor or any subcontractor on the work, the difference between the rate of wages required by this contract to be paid to laborers or mechanics on the work and the rate of wages actually paid to such laborers and mechanics.

There is no evidence to show what amount was paid the workmen who were employed by the contractor, but the burden of proof is on the plaintiff to show that the contractor complied with the provisions of the contract. This it has failed to do, and we think it can not recover on account of this deduction.

Our conclusion, therefore, is that the plaintiff is entitled to recover only the two items of $10,312.48 and $3,000.00, referred to above, or a total of $13,312.48, for which judgment will be rendered accordingly.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.
WHITAKER, *Judge*, took no part in this decision.

WALTER E. SCHUH v. THE UNITED STATES

[No. 43909. Decided March 3, 1941]

On the Proofs

Pay and allowances; purpose of rental allowances.—Rental allowances are intended to reimburse an officer for money expended only when he is not furnished quarters and provides his own quarters, and where an officer is furnished and occupies one room when entitled to more, he cannot recover for the room occupied.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was appointed as second lieutenant in the Coast Artillery Reserve on June 24, 1933, and was promoted to first lieutenant, Coast Artillery Reserve, July 10, 1936, and has continued in the Officers' Reserve Corps to the present time. He was on active duty under his Reserve commission for training from August 17 to 30, 1933, and was on active duty with the Civilian Conservation Corps from May 6, 1935, to August 6, 1937.

2. Plaintiff's father, Albert Schuh, died December 5, 1927, in New York City. At the time of his death he owned property of the total value of approximately $240,000, consisting of a manufacturing plant (valued at approximately $30,000) and stocks and bonds.

3. Plaintiff's mother, Mrs. Selma Alberta Schuh, was born July 18, 1877, and is still living. She did not remarry after the death of plaintiff's father. Plaintiff is the only child, and during the period of this claim was unmarried.

4. Plaintiff's father died testate, leaving two-thirds of his estate to the mother and one-third to the plaintiff. Part of the proceeds of the stocks and bonds was put by them into the manufacturing business left by the father. Plaintiff

and his mother were executors of the will, and plaintiff managed the estate until the business went into bankruptcy. The entire property left to the mother, as well as that left to the plaintiff, was lost prior to the beginning of the period here in question. A discharge in bankruptcy was received.

5. Plaintiff's mother owns no property, nor did she own any property at any time during the period of the claim other than household goods and furniture for three rooms. She has not at any time been gainfully employed and she is now, and during the entire period of the claim was, dependent upon the plaintiff for her entire support.

6. Plaintiff's mother had no income during the period of the claim other than the contributions made to her by the plaintiff. She lived in an apartment, the rent of which was between $50 and $60 a month. Her sister occupied the apartment with her and paid $10 or $15 a month towards the rent. She did not board with plaintiff's mother. During the period of the claim plaintiff regularly contributed not less than $100 a month for the support of his mother.

7. The mother did not occupy Government quarters at any time during the period of the claim. From June 24, 1935, to May 28, 1936, plaintiff was stationed at Yaphank, New York, and from May 29, 1936, to August 6, 1937, at Elmsford, New York, and during these periods of time he was furnished and occupied one room in the officers' quarters, which was equipped with a steel cot, blankets, sheets, pillow and pillow cases, a wooden table and bench, and in which officers' quarters there were a lavatory, bathing facilities and a living room for lounging.

8. Plaintiff was never paid rental allowance with or without dependents, and was never paid subsistence allowance on account of a dependent, at any time during the period of his claim.

9. The plaintiff, having received one room, was only entitled to a further allowance of $250.66 for one room from June 24, 1935, to July 9, 1936, and $516 for two rooms from July 10, 1936, to August 6, 1937, a total of $766.66, in accordance with the report of the General Accounting Office.

The court decided that the plaintiff was entitled to recover.

Opinion *per curiam:*

This is a suit of a Coast Artillery Reserve Officer, United States Army, for rental and subsistence allowances authorized for an officer of his rank with a dependent while assigned to active duty from June 24, 1935, to August 6, 1937.

During the period of this claim, the plaintiff was a second lieutenant, Coast Artillery Reserve, to July 10, 1936, and was a first lieutenant from that date. The findings show that during this period his mother was dependent upon him for her chief support and did not occupy Government quarters. At the time involved, the plaintiff was stationed at Yaphank and Elmsford, New York, and was furnished and occupied one room in the officers' quarters which was properly equipped.

Plaintiff was not paid rental allowance for an officer or subsistence allowance on account of a dependent at any time during the period of his claim. If he were entitled to full allowances for this period there would be due him the sum of $1,511.13, but this court has repeatedly held that rental allowances are intended to reimburse an officer for money expended only when he is not furnished quarters and provides his own and that where an officer is furnished and occupies one room when entitled to more, he can not recover for the room occupied (*Hartsel* v. *United States* (decided November 12, 1940), 92 C. Cls. 127; *Francis* v. *United States*, 89 C. Cls. 78; *Beery* v. *United States*, 87 C. Cls. 557; *Byrne* v. *United States*, 87 C. Cls. 241). Under the statute (43 Stat. 250, amending 42 Stat. 625) authorizing the payment of rental allowances, an officer of plaintiff's rank, with or without dependents, not receiving quarters would be entitled to rental allowances for two rooms from June 24, 1935, to July 9, 1936 (when he was a second lieutenant), amounting to $501.33, and for three rooms from July 10, 1936, to August 6, 1937 (when he was a first lieutenant) amounting to $744, as found by the General Accounting Office. Having received one room, he would be entitled to be paid only the equivalent of the rental allowance for one room from June 24, 1935, to July 9, 1936, or $250.66, and the equivalent of the rental allowance for two rooms from July 10, 1936, to August 6, 1937, or $516, a total of $766.66.

The statute also authorizes the payment of an additional subsistence allowance to an officer with a dependent, receiving the pay of the second or third pay period. The Comptroller General in his computation of the subsistence allowances due has reported that plaintiff was paid one subsistence allowance from June 16, 1935, to August 6, 1937, and that an additional subsistence allowance from July 10, 1936, to August 6, 1937, would amount to $235.80. This added to his allowance for quarters makes a total of $1,002.46 which plaintiff is entitled to recover and for which judgment will be rendered accordingly in his favor.

BARUCH M. HORNBLASS v. THE UNITED STATES

[No. 44049. Decided March 3, 1941]

On the Proofs

Pay and allowances; retirement of enlisted man after 30 years service.—Where plaintiff enlisted in the United States Army January 20, 1893, and served therein under various reenlistments until December 21, 1926, and was in time promoted until he reached the grade of first sergeant; and where he had to his credit, counting foreign service as double time, over 30 years of actual service when on November 20, 1926, he made application for retirement as first sergeant, in which grade he was then serving; it is *held* that under the Act of March 2, 1907, he was entitled to be retired with the retired pay and allowances of a first sergeant, and accordingly is entitled to recover the difference between the retired pay of first sergeant and the retired pay of sergeant, at which grade he was retired on December 21, 1926.

Same; demotion after retirement application.—Where on November 20, 1926, while serving in the grade of first sergeant, and receiving the pay and allowances of that grade, plaintiff made application for retirement as first sergeant, having then more than 30 years of service to his credit; and where after having duly and regularly made said application for retirement as first sergeant, plaintiff was on December 1, 1926, demoted to private and on the same day promoted to sergeant; it is *held* that plaintiff was entitled to be retired with the retired pay and allowances of first sergeant.

Same; unauthorized changes in retirement application.—Where on November 20, 1926, while serving in the grade of first sergeant

and receiving the pay and allowances of that grade, plaintiff made application for retirement at said grade, having then to his credit 30 years of service; and where, after the application had been submitted by him to the proper authority, the date of said application above his signature was, without his knowledge or consent, changed from "November 20, 1926" to "December 1, 1926" and the title below his signature was changed from "1st. Sgt. Co. K., 18th Infantry" to "Sgt. Co. K., 18th Infantry"; and where plaintiff was subsequently, on December 21, 1926, placed on the retired list as a sergeant, since which time he has been receiving the retired pay and allowances of a sergeant; it is *held* that plaintiff is entitled to recover.

Same.—The case of *Blackett* v. *United States*, 81 C. Cls. 884, is reexamined and reaffirmed.

Same; effect of later enactment.—The provisions of the Act of February 14, 1885 (23 Stat. 305), amended by the Act of February 1, 1890 (26 Stat. 504), and the provisions of the Act of March 2, 1907 (34 Stat. 1217), both relate to the matter of retirement of enlisted men but the language of the two acts with reference to retirement and retirement pay is not the same, and the rights and privileges granted by the later enactment must control whether they are more, or less, favorable to the enlisted men.

Same; act of March 2, 1907.—The provisions of the Act of March 2, 1907, are not in any respect ambiguous but are positive and direct.

Same; ambiguity.—A supposed ambiguity may not be injected into a later act by reference to some different language in a prior statute.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* were on the brief.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

In this case plaintiff, a retired enlisted man in the United States Army, sues to recover $3,000, or more, as may be shown by an exact computation by the General Accounting Office as the difference between the retired pay and allowances authorized by law for a first sergeant in the U. S. Army and the pay and allowances which have been paid to and received by him as a sergeant on the retired list for

the period from August 1, 1932, six years prior to the filing of the petition, to date of judgment. The pay and allowances accrue monthly. The defendant contends upon the facts hereinafter set forth in the findings that the statute which gave the plaintiff the right to retire prohibits the allowance of the claim made.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff enlisted in the United States Army January 20, 1893, and served therein under various reenlistments until on the 20th of November 1926, counting foreign service as double time, he had had over 30 years of actual military service.

He served in various capacities as private, musician, trumpeter, private first class, and corporal until he was promoted from corporal to sergeant April 26, 1926, and from sergeant to first sergeant September 17, 1926. After plaintiff had duly and regularly made application for retirement as first sergeant, in which grade he was then and had theretofore been serving, he was demoted to private December 1, 1926, and on the same day promoted to sergeant.

2. November 20, 1926, while serving in the grade of first sergeant, and receiving the pay and allowances of that grade, the plaintiff regularly made an application for retirement, the date of which was altered above his signature from "November 20, 1926," to "December 1, 1926," and the title below his signature from "1st Sgt. Co. 'K' 18th Infantry," to "Sgt. Co. 'K' 18th Infantry," after the application had been submitted by him to the appropriate authority. These changes were made without his knowledge or consent. The alterations and plaintiff's demotion December 1, 1926, to private and his promotion to sergeant the same day, were for the sole purpose of retiring him in the grade of sergeant instead of first sergeant, and preventing him from receiving the statutory retired pay and allowances of a first sergeant.

3. Plaintiff was placed on the retired list December 21, 1926, as a sergeant, since which time he has received the retired pay and allowances of a sergeant only. Payments

thereof have been made to him on a monthly basis on the last day of the month for the amount due for that month.

4. The claim is a continuing one, and the amount of judgment, if any, subject to future reckoning. The petition was filed August 27, 1938.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The facts in this case show that prior to the filing by the plaintiff of an application for retirement as a first sergeant on September 17, 1926, he had to his credit over thirty years of active military service, which term of service entitled him under the existing applicable statute to retirement with 75 percentum of the pay and allowances he was then receiving. Plaintiff served as private and in various other capacities to which he was duly and regularly promoted until he reached and was duly promoted to the rank of first sergeant on September 17, 1926, and he served in that capacity until he had duly and regularly acquired credit for thirty years of active military service, and subsequently. No charges of any kind were ever preferred against plaintiff and he was not demoted in grade for any reason specifically authorized by law or by Army Regulations.

The uncontroverted facts show that on November 20, 1926, while plaintiff was regularly serving in the grade of first sergeant and had to his credit more than thirty years of active military service, he duly and regularly made application pursuant to the act of March 2, 1907, 34 Stat. 1217, for retirement in the rank of first sergeant to which he had theretofore been duly promoted on September 17, 1926. After plaintiff had made proper application for retirement to the appropriate authority some officer of the War Department altered the application as set forth in finding 2, without plaintiff's knowledge or consent, to conform to an action taken in the War Department on December 1, 1926, of arbitrarily reducing plaintiff to the rank of private and promoting him to the grade of sergeant on the same day. This action of demoting plaintiff from first sergeant to sergeant was taken by the War Department

solely for the purpose of preventing plaintiff from receiving the retired pay and allowances of a first sergeant, in which grade plaintiff was serving at and prior to the date on which he made application for retirement and at the time he had completed thirty years' service. In these circumstances we are of opinion that under the provisions of the Act of March 2, 1907, *supra*, plaintiff is entitled to recover the unpaid allowances claimed as was held by this court in *Blackett* v. *United States*, 81 C. Cls. 884; and followed in *Standerson* v. *United States*, 83 C. Cls. 633; *Holub* v. *United States*, 85 C. Cls. 701; *Bale* v. *United States*, 89 C. Cls. 532; *Commings* v. *United States*, 89 C. Cls. 498, and *Dene* v. *United States*, 89 C. Cls. 502.

The plaintiff in the *Blackett* case made application for retirement in the grade of master sergeant after having completed thirty years of service and the War Department thereafter reduced him to a lower grade and retired him as a private. In holding that *Blackett* was entitled to three-fourths of the pay and allowances of a master sergeant and that he was entitled to recover the difference between the retired pay and allowances of such grade and the retired pay and allowances of a private which had been paid to him, this court said at page 891:

> * * * The enlisted man applied to be retired when he was a master sergeant and the Department gave consent for the retirement as a private. The law fixed the grade upon which he should retire. It gave no authority to anyone for any cause whatsoever to designate the grade after application had been made to the President. Compensation during retirement followed the grade. No official approval was necessary.
>
> The words of the act are plain, and their meaning simple. The act imposed an imperative duty and not a discretionary power. The Department has read into the act discretionary powers and has assumed the right to permit retirement and to select the grade in which retirement is permitted. The act confers no such powers on the President. * * * the grade in which he was entitled to be retired was that in which he was serving when the application was made. *Cloud* v. *United States*, 43 C. Cls. 69; *Medbury* v. *United States*, 173 U. S. 497. The facts show a capricious and arbitrary

assumption of powers by officers of the War Department over an enlisted man which has no basis in law.

In the case at bar, the attorney for the defendant argues that the decisions of this court in *Blackett* v. *United States*, and the other cases cited, *supra*, were erroneous and should be reversed. This contention is based on the claim that the act of March 2, 1907, *supra*, which provides "when an enlisted man shall have served thirty years either in the Army, Navy, Marine Corps, or in all, he shall, upon making application to the President, be placed on the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of, * * *" entitled plaintiff only to the retired pay and allowances of a sergeant, to which grade he had been demoted by some officer in the War Department after he had made his application for retirement, but before such application was approved by the President, for the reason that the grade in which he was placed on the retired list is controlling. In other words, counsel for defendant contends that after an enlisted man has served thirty years and has made application to the President to be placed on the retired list in the grade in which he is then serving the words of the statute, that such enlisted man "shall be placed on the retired list, with seventy-five per centum of the pay and allowances he may then be in receipt of," mean such retired pay and allowances as may be provided by law for a grade in which such enlisted man is placed on the retired list, even though that grade and the retired pay and allowances thereof may be below the grade in which he was serving and the pay he was receiving at and prior to the time he completed the necessary thirty years' service and made his application to be placed on the retired list. We are of opinion that this contention is without merit. In so contending defendant's counsel relies entirely upon the language found in an act of February 14, 1885, 23 Stat. 305, as amended by an act of February 1, 1890, 26 Stat. 504, which provided that "when an enlisted man has served as such thirty years in the United States Army or Marine Corps, either as private or noncommissioned officer, or both, he shall by application to the President be placed on the retired list hereby created, with the rank held by

him at the date of retirement, and he shall receive thereafter seventy-five per centum of the pay and allowances of the rank upon which he was retired," and insists that the quoted language of the act of March 2, 1907, *supra*, has exactly the same meaning as the act of 1885, and that the retired pay and allowances of plaintiff must be those of the rank (sergeant) to which he was demoted after he had completed thirty years of service and had duly made application for retirement. The provisions of the acts of 1885 and 1907 both relate to the matter of retirement of enlisted men, but the language of the two acts with reference to retirement and retired pay is not the same, and the rights and privileges granted by the later enactment must control whether they are more or less favorable to the enlisted man concerned. We do not think that the provisions of the act of March 2, 1907, are in any respect ambiguous but are positive and direct. In such circumstances, a supposed ambiguity may not be injected into such an act by reference to some different language in a prior statute. Where there is ambiguity and reasonable doubt as to the meaning of the provisions of a recent statutory enactment, resort may be had to the statute *in pari materia* for the purpose of resolving such ambiguity or doubt, but that rule should never be applied for the purpose of creating doubt as to the meaning of the later enactment and for the purpose of giving it the same construction to which the prior enactment might be susceptible. If Congress had intended that the provisions of the act of March 2, 1907, should be given exactly the same interpretation and application as the acts previously enacted in 1885 and in 1890, we think it is obvious that Congress would not have made a change in the language but would have employed the same language which had been used in the earlier statutes, or such other language as would disclose that intention sufficiently clear not to be misunderstood. A change in language, other than merely for the purpose of clarification, is some evidence of a change in purpose which Congress intended to accomplish by such change in language. For all that appears in this record, the purpose which Congress had in mind and intended to accomplish by the language used in the act of 1907 may have been

to prevent the very thing that happened in the case at bar, in order that an enlisted man might not be arbitrarily deprived of the retired pay and allowances of which he was in receipt at the time he became entitled to retire and at the time he properly made application to the President for such retirement. We are certainly not justified in presuming that the use by Congress of language in the later enactment indicating an intent to accomplish a definite purpose had only the effect of creating an ambiguity. The provisions and history of the act of February 14, 1885, as amended by the act of 1890, *supra*, upon which counsel for defendant bases his contention in the case at bar, were fully briefed and discussed in plaintiff's brief in the case of *Blackett* v. *United States*, *supra*, and that act and its history, in connection with the act of 1907 under which Blackett was retired, were duly considered by the court in reaching its conclusion, but, for the reasons hereinbefore stated in this opinion, we did not consider that the act of 1885 had any important bearing or controlling influence on the question presented and for that reason it was not discussed in the opinion. The purpose and intent upon which was founded the original and subsequent enactments of the provisions for retirement of enlisted men, as disclosed by the Committee Reports which accompanied the original act of 1885, are consistent with the language of the act of 1907 and the interpretation which we have placed on it. The Lieutenant General of the Army stated and recommended in 1884 to the 48th Congress, First Session, that "thirty years would be a proper period of service to authorize the retirement of a private soldier or a noncommissioned officer," and Report No. 616, 48th Cong., 1st Sess., of the House Military Affairs Committee, recommended the passage of the bill which became the act of February 14, 1885, and stated that "Something is needed to give greater stability and better standing to the enlisted man in our military service. If he can feel that we have made proper provision for his old age he would be more likely to accept the monotonous life of the service contentedly." The Senate Military Affairs Committee adopted the report of the House of Representatives on the

bill and on behalf of this committee it was stated that "If we show, by an act of Congress, our determination to take care of these old men after they have honorably and faithfully served their country for that long time, it will be a great incentive to them to remain in the service." In view of the purpose clearly intended to be accomplished by the enactment of the provisions giving enlisted men and noncommissioned officers the right of retirement, we do not think that the meaning of the language of the act of 1907 is in any wise doubtful. The applicable provisions of the act of 1907 were intended for the benefit of enlisted men and to assure them that upon becoming eligible for retirement and upon making application to the President therefor they would receive 75 percentum of the pay and allowances they were in receipt of under the grade in which they were serving at the time of making such application. These provisions were enacted from motives of public policy and should not be narrowly construed. As was said in the opinion in the *Blackett* case "The words of the act are plain, and their meaning simple. The act imposed an imperative duty and not a discretionary power," and neither the President nor any subordinate officer of the War Department has the right "to select the grade in which retirement is permitted."

Plaintiff is entitled to recover the difference between the retired pay of a first sergeant and that of a sergeant, and judgment therefor will be entered in his favor upon the filing of a report from the General Accounting Office showing the amount due for the period August 1932 to date of judgment. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

HARRY MAXWELL v. THE UNITED STATES

[No. 43922. Decided March 3, 1941]

On the Proofs

Pay and allowances; retirement of enlisted man under the Act of March 2, 1907.—Where plaintiff enlisted in the United States Army, April 28, 1906, and served continuously under numerous reenlistments in various grades until July 31, 1934; and where on June 6, 1934, plaintiff while serving as master sergeant and receiving the pay and allowances of a master sergeant but before he had acquired credit for 30 years of military service, made application in writing for retirement as master sergeant; it is *held* that under the Act of March 2, 1907, plaintiff is not entitled to recover.

Same.—The cases of *Blackett* v. *United States*, 81 C. Cls. 884, and *Hornblass* v. *United States*, *ante*, p. 148, are distinguished; *Cherry* v. *United States*, 89 C. Cls. 318, cited.

The Reporter's statement of the case:

Mr. Mahlon C. Masterson for the plaintiff. *Ansell, Ansell & Marshall* on the brief.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff instituted this suit to recover the difference between the retired pay authorized by law for a master sergeant and the pay actually received by him as a sergeant on the retired list, which increased retired pay for the period July 31, 1934, the date on which he was retired, to April 30, 1938, about the date on which the petition was filed, amounted to $3,010.99.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff enlisted in the United States Army April 28, 1906, and served continuously under numerous reenlistments in various grades until July 31, 1934. March 17, 1934, upon recommendation of the Troop Commander, plaintiff was duly and regularly appointed master sergeant by Special Orders No. 34 of the War Department. He remained in the grade of master sergeant and received the pay and al-

lowances thereof until June 7, 1934, under the circumstances hereinafter set forth in finding 2.

2. On June 6, 1934, plaintiff, while serving as master sergeant and receiving the active-duty pay and allowances of a master sergeant but before he had acquired credit for thirty years of active military service, made application in writing for retirement as master sergeant under the act of March 2, 1907 (U. S. Code, Title 10, section 947), which provided in part that "when an enlisted man shall have served thirty years either in the Army, Navy, or Marine Corps, or in all, he shall, upon making application to the President, be placed upon the retired list."

Plaintiff's application for retirement as master sergeant was, at his request, prepared by Troop Clerk James E. Ligon, and was signed by plaintiff in the presence of such clerk. After the application had been so signed, plaintiff left it with the troop clerk to be forwarded through proper channels to The Adjutant General in Washington. On June 7, 1934, the Post Adjutant called plaintiff to his office to discuss his application for retirement and told him that there was a surplus of master sergeants and that he, therefore, would not be retired as master sergeant at that time, and that he would be reduced in grade but that as soon as the surplus master sergeants became absorbed he could then be promoted to master sergeant and be retired in that grade. Plaintiff was thereupon reduced to grade of private on June 7, 1934, as of June 1, 1934, by Special Orders No. 70, and his application for retirement in the grade of master sergeant was denied. On June 21, 1934, by Special Orders No. 77, plaintiff was again promoted to the grade of sergeant.

3. Later, on July 8, 1934, after his application for retirement in the grade of master sergeant had been denied and he had been reduced to the grade of private and later again promoted to the grade of sergeant, plaintiff made written application for retirement in the grade of sergeant. At that time he had to his credit more than thirty years of active service. On July 23, 1934, orders were issued for retirement of plaintiff as a sergeant and on July 31, 1934, he was retired as a sergeant and since that time he has re-

ceived the retired pay of that grade. At the time of his retirement he had a total service of thirty years, one month, and seven days of active military service, including allowance for double time for service in the Philippine Islands.

4. The difference between the statutory retired pay of a master sergeant and the retired pay received by plaintiff as a sergeant from July 31, 1934, to April 30, 1938, is $3,010.99. The claim is a continuing one.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Plaintiff bases his claim for the additional retired pay over that received by him as a sergeant on the ground that at the time he made application for retirement on June 6, 1934, he was serving in the grade of master sergeant and was receiving active-duty pay and allowances of that grade, and that he did not at any time voluntarily withdraw that application. Upon the facts disclosed by the record and set forth in the findings, we are of opinion that plaintiff can not recover the claimed increased retired pay under the act of March 2, 1907, 34 Stat. 1217, and that his case does not come within the principles announced by this court in *Blackett* v. *United States*, 81 C. Cls. 884, and *Hornblass* v. *United States*, *ante*, p. 148.

In the instant case, plaintiff's right to retire had not vested under the act of 1907 at the time he made his first application, nor at the time he was reduced in grade and at the time his application was denied. On those dates plaintiff had not completed thirty years of military service, and had a total credit of less than thirty years' service, including allowance for double time for service in the Philippine Islands. Thereafter, on July 8, 1934, when he had completed thirty years' service and had become entitled to retirement, and while he was serving in the grade of sergeant, receiving the pay and allowances of that grade, plaintiff made written application for retirement in that grade and was so retired on July 31, 1934. In these circumstances he was entitled to be retired only in that grade and to receive the retired pay

thereof. *Cherry* v. *United States*, 89 C. Cls. 318. Plaintiff contends that the *Cherry* case is not in point for the reason that there the enlisted man withdrew his application after he had been demoted, but no valid distinction can be drawn between the withdrawal of the application and a denial thereof because the enlisted man had not completed thirty years' service.

Since plaintiff's claim does not come within the provisions of the Act of March 2, 1907, the petition must be dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE THIRD SCOTTISH AMERICAN TRUST CO., LIMITED, v. THE UNITED STATES

[No. 44071. Decided March 3, 1941]

On the Proofs

Income tax; dividends included in ratable deduction under section 119 (b) of the Revenue Act of 1932.—Under section 119 (b) of the Revenue Act of 1932 providing that from the gross income of taxpayer "shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto, and a ratable part of any expenses, losses, or other deductions which cannot be allocated to some item or class of gross income," and "the remainder, if any, shall be included in full as net income from sources within the United States," it is *held* that the "ratable part" of such expenses is the ratio between all of taxpayer's gross income in the United States, including dividends, and its total gross income from all sources. *London and Lancashire Ins. Co., Ltd.* v. *Commissioner*, 34 B. T. A., distinguished.

Same.—If a statute is plain and unambiguous, it must be enforced as written, although the result be illogical.

Same; general expenses.—The provision for the deduction of a "ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income" includes the general expenses of a foreign corporation the principal business of which may have been carried on outside of the United States.

Same; foreign income taxes.—Where the British income tax was levied on the plaintiff's entire income, including its income from sources within the United States, it is *held* that, under section 119 (b) of the Revenue Act of 1932, a ratable part of such taxes should be deducted in determining the income tax to be paid to the United States.

Same; interest on debenture stock certificates.—Where interest on taxpayer's debenture stock certificates was payable irrespective of the sufficiency of the earnings or of the surplus of the company, and where on liquidation both the principal and the interest due on said certificates were entitled to share *pari passu* with unsecured creditors; it is *held* that payments of said interest were payment of interest rather than distribution of dividends.

Same.—Interest paid on borrowed money, including interest on debenture certificates and on debenture stock certificates, have a connection with all of the company's investments, including its investments in the United States, and plaintiff is accordingly entitled to deduct a ratable part of said interest, under section 119 (b) of the Revenue Act of 1932.

The Reporter's statement of the case:

Mr. Ralph P. Wanlass for the plaintiff. *Messrs. Walter G. Moyle* and *Earl B. Breeding* were on the briefs.

Mr. J. W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the Companies Acts of Great Britain, 1862 to 1867, with its principal place of business at 22 Meadowside, Dundee, Scotland, and without an office, place of business or agent in the United States.

The Government of Great Britain permits citizens of the United States to prosecute claims against it in its courts.

2. On its income-tax return for the calendar year 1933, duly filed with the Collector of Internal Revenue at Baltimore, Maryland, plaintiff reported interest received from sources within the United States of $15,560, and dividends received from domestic corporations of $31,581.61. But it claimed deductions on said return which exceeded the income reported by the amount of $10,674.81, resulting in a

net loss from sources within the United States. However, taxes in the total amount of $1,413.71 had been withheld at the source by the parties from whom plaintiff received interest and dividends, and these parties had paid said taxes to the Collector of Internal Revenue.

3. Claiming a net loss and, therefore, that no taxes were due the defendant, plaintiff duly filed a claim for refund for the amount of $1,372.11. This claim was allowed by the Commissioner in the amount of $339.11, but the balance was rejected.

On its return plaintiff claimed a deduction of $10,393.86 interest, losses of $3,639.50, dividends of $31,581.61, "appropriate proportion of British income tax applicable to United States income, $11,844.79," "appropriate proportion of rent, rates, charges, etc., to United States income, $316.66." The Commissioner disallowed in full the interest claimed as a deduction, and reduced the amount claimed on account of proration of British income tax by the amount of $7,961.99, and he reduced the amount claimed for proration of management expenses by the amount of $134.22.

With reference to the interest claimed as a deduction, which was disallowed by the Commissioner, the Commissioner said:

> It is held that interest paid by home office is not an allowable item to be prorated as deduction against taxable income from sources within the United States when such income is entirely interest.

He reduced the deduction for British income taxes and for management expenses because he held that the ratable part of these taxes and expenses which might be deducted was to be ascertained by taking such part thereof as the ratio of the taxpayer's taxable income from sources within the United States bore to its total income; whereas, the taxpayer had taken that part thereof which the ratio of its total income from sources within the United States, including income not subjected to the tax, bore to its total income.

4. During the year 1933 plaintiff paid £14,000 to holders of its 4 percent debenture stock of the par value of £350,000; and £4,951 to holders of its terminable debentures of a par value of £100,000; also British income taxes of £21,669 7s. 10d.; management expenses of £365 2s. 2d.; salaries to clerks of £984

8s. 4d.; and fees to directors of the corporation for services rendered in the sum of £2,604 19s. and 1d.

5. Plaintiff's total gross income for 1933 from all sources, including income from sources within the United States, was £85,945 19s. and 8d. At a rate of exchange of $4.15½, this amounts to $357,105.56. Its total income from sources within the United States was $47,141.61, of which $31,581.61 was dividends from corporations chartered under the laws of the United States.

6. The British income taxes paid by plaintiff were computed on the basis of its entire income, including income from sources within the United States.

7. The debentures, upon which a portion of the interest aforesaid was paid, read in part as follows:

> WE, THE THIRD SCOTTISH AMERICAN TRUST COMPANY, LIMITED (hereinafter called the Company), incorporated under the Companies Acts, 1862 to 1867, acknowledge that we have borrowed and received from_____________ ____ the sum of_______________, which sum we bind and oblige ourselves to repay to the said_____________ ______within our Registered Office at Dundee for the time being on the ______ day of __________, Nineteen hundred and __________, or on such subsequent date as may be mutually agreed upon by Minute to be endorsed hereon, with the Interest of the said principal sum at the rate of ________ per centum per annum from the ______ day of __________, Nineteen hundred and __________, to the date of payment before specified, and thereafter at such rate as may be agreed upon in the event of the Loan being continued by any Minute endorsed hereon as aforesaid, which Interest shall be payable half yearly upon the ______ day of __________ and the ______ day of ________ commencing payment of the said Interest on the ______ day of __________, Nineteen hundred and __________, for the Interest then due.

The debenture stock certificates, upon which a portion of the aforesaid interest was paid, read in part as follows:

> THIS IS TO CERTIFY that William Robert Anderson, Clerk, Ivybank, Montague Street, Barnhill, Broughty Ferry, is the holder of One Hundred Pounds Debenture Stock of THE THIRD SCOTTISH AMERICAN TRUST COMPANY, LIMITED, bearing interest at the rate of four percent per annum payable by equal half yearly instal-

ments on the first day of January and the first day of July in each year and issued upon and subject to the conditions printed on the back hereof.

The agreement, under which these debentures and debenture stock certificates were issued, recites, among other things: (1) it was issued pursuant to the power granted plaintiff in its charter to borrow money; (2) the right of both the holders of the debentures and of the debenture stock certificates to interest was not dependent upon whether or not the company had earnings or whether or not there was a surplus sufficient to pay the interest; (3) on default in the payment of interest the holders of both the debentures and debenture stock certificates could force collection of both principal and interest "by summary diligence or otherwise in the manner hereinafter provided." After so providing, the instrument, in articles 6, 7, and 13 thereof, provides as follows:

> 6. When and so soon as the Stock and Debentures shall become payable in terms of the preceding Article, the Trustees may, in their discretion, and on the facts in respect of which such Stock and Debentures shall have become payable coming to their knowledge (without any request or assent), and shall, upon the request, in writing, of the holder or holders of one-half of the Stock and Debentures at the time being issued and outstanding (and without any consent on the part of the Company or its successors) take such steps as the Trustees think fit to enforce the payment by the Company of the principal moneys and interest outstanding and to become due in respect of the Stock and Debentures. A Certificate under the hand of a majority of the Trustees if more than one, or, if a Company is Trustee, under the hand of any two of its Directors, or of their law agent, shall be final and conclusive evidence of the occurrence of any of the events specified in the preceding Article.
>
> 7. Before taking any legal proceedings to enforce payment as aforesaid, the Trustees shall (except when in their opinion further delay would imperil the interests of the Stockholders or Debentureholders, or in the event of an order being made or an effective resolution being passed for the winding-up of the Company) give to the Company written notice of their intention to proceed, and shall not take any legal proceedings if, in

the event of any default in payment of any principal moneys or interest, the Directors shall satisfy the Trustees that payment of the principal or interest so in arrear will be made within one calendar month next after such notice shall have been given to the Company.

* * * * *

13. The Trustees in entering into these presents shall be held to do so as representing the whole body of Stockholders and Debentureholders, and the obligations undertaken by the Company under these presents and any Personal Bonds shall, except as aftermentioned, only be enforceable at the instance of the Trustees, and individual Stockholders shall not have any right of action against the Company except through the Trustees. But notwithstanding the preceding part of this clause and in addition to the provisions of Article 5 hereof, each individual Debentureholder shall be entitled to enforce the obligations contained in his Debenture and under these presents in any of the events specified in Article 5 hereof.

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

I

The plaintiff is a foreign corporation chartered under the laws of Great Britain. During the year 1933 it derived income from sources within the United States consisting of interest and dividends. It seeks to deduct from such gross income a "ratable part" of its home office expenses, interest, and British income taxes. The first question presented is the proper method of determining this "ratable part."

The plaintiff says that this ratable part is the ratio between all of its gross income in the United States, including dividends, and its total gross income from all sources. The defendant says that the ratable part is the ratio between plaintiff's income from sources within the United States, exclusive of dividends, and its total income from all sources— in the latter of which, strangely enough, it includes the same dividends which it excludes in determining income from sources within the United States.

Section 119 (b) of the Revenue Act of 1932 (47 Stat. 169, 209) is the basic section to be considered. It reads:

> (b) NET INCOME FROM SOURCES IN UNITED STATES.— From the items of gross income specified in subsection (a) of this section there shall be deducted the expenses, losses, and other deductions properly apportioned or allocated thereto and a ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income. The remainder, if any, shall be included in full as net income from sources within the United States.

The items of gross income specified in subsection (a) are items to be included in determining "income from sources within the United States." From these items subsection (b) permits the deduction of expenses, etc., "properly apportioned or allocated thereto"; that is to say, expenses incurred in the earning of the income specified. Further, it was recognized that the taxpayer would incur expenses attributable to the earning of both its United States and its other income, and that it would not be possible to say with any degree of accuracy just how much of it was incurred in the earning of United States income and how much in the earning of other income. So, in such case it was provided that the taxpayer might deduct a "ratable part" thereof. This meant, of course, such part as the ratio of its gross income from United States sources bore to its total gross income. All that it is necessary for us to do, therefore, to decide the issue between the parties is to look to the Act to see if dividends are included in what the statute defines as gross income from sources within the United States. We find they are specifically included.

But the defendant says Congress could not have intended to include dividends because they are not subject to the tax. Be that as it may, Congress nevertheless explicitly did include them. The Act says: "The following items of gross income shall be treated as income from sources within the United States." It first lists interest, and then dividends from two classes of corporations—and it is conceded the corporations from which these dividends were received come

within one of the classes named—and then other items with which we are not concerned.

This being true, we have no option but to apply the Act as it is written. If Congress failed to provide for a contingency for which it should have provided, the courts are powerless to supply the omission. If the statute is plain and unambiguous, it must be enforced as written, although the result be illogical.

In support of its position the defendant cites *London and Lancashire Ins. Co., Ltd.*, v. *Commissioner*, 34 B. T. A. 295. The question there was the same as the question here, but it arose not under the sections of the Act we have under consideration, but under those sections applicable to insurance companies. Section 204 (a) of the Revenue Act of 1928 (45 Stat. 791, 844) included dividends within an insurance company's gross income, but subsection (c) permitted the deduction of "the amount received as dividends from corporations as provided in section 23 (p)." There is no such provision in section 119 (b) of the Revenue Act of 1932; nor was there any such provision in section 119 (b) of the Revenue Act of 1928. Furthermore, subsection (e) of section 204 of the Revenue Act of 1928 provided that "Nothing in this section shall be construed to permit the same item to be twice deducted," and the Board expressly rested its decision on this subsection, holding that to permit dividends to be taken into consideration in determining the ratable part of expenses, etc., to be deducted would be tantamount to permitting them to be deducted twice. This subsection relates alone to insurance companies and has no application to a taxpayer of the character of plaintiff in the case at bar.

The language of the sections before us is so explicit that we have no option but to hold that in determining the ratable part of the deductions to which plaintiff is entitled, we must take that part of them which plaintiff's total gross income from sources within the United States, including dividends, bears to its total income from all sources.

II

The defendant in its brief says that the plaintiff has not shown that the following claimed deductions "are connected

with income from sources within the United States," to wit: (1) home office general expenses; (2) British income tax; (3) interest paid to debenture holders and debenture stockholders.

1. It is no doubt true that the general expenses of the home office were incurred primarily in the carrying on of the business of the company outside of the United States, but it cannot be said that some part of these expenses were not spent in connection with the making and supervision of the plaintiff's investments in this country, from which it received interest and dividends. Just what part was spent in connection with United States investments it is impossible to say. This contingency was recognized by Congress when provision was made for the deduction of a "ratable part of any expenses, losses, or other deductions which cannot definitely be allocated to some item or class of gross income." The plaintiff is entitled to this deduction.

2. The defendant concedes that the British income tax was levied on the plaintiff's entire income, including its income from sources within the United States. It is, therefore, manifestly proper that a ratable part of these taxes should be deducted from United States income in determining the tax to be paid the defendant.

3. The defendant concedes in its brief that the interest paid the debenture holders and debenture stockholders were interest payments, rather than distributions in the nature of dividends. We have carefully examined the debenture certificates and the debenture stock certificates and the instrument securing them. We have no doubt that the payments made on the debenture certificates were interest, but the nature of the payments on the debenture stock certificates is not so easy to determine. After careful consideration, however, and upon the authority of the cases cited on this point in the plaintiff's excellent brief, we hold that the returns on the debenture stock were also interest and not dividends.

In so holding we are influenced primarily by the fact that interest on these certificates was payable irrespective of the sufficiency of the earnings or of the surplus of the company, and also by the fact that both the principal and interest due on these certificates were entitled to share in the assets of the

company on liquidation *pari passu* with unsecured creditors. It is true that the holders of these certificates could not demand a return of the principal so long as the company was not in default in the payment of interest and so long as it complied with the other conditions of the indenture securing them; but this alone is not sufficient to characterize the transaction as a purchase of shares in the company rather than a loan of money to it. The holder risked neither his capital nor the return thereon on the fortunes of the company. His return was payable whether the company made profits or not, and he secured the return of his principal on a parity with other unsecured creditors of the company. Such are the characteristics of a loan to the company, rather than of a purchase of a proprietary interest in it. See in particular the opinion of the 4th Circuit Court of Appeals in *Helvering* v. *Richmond, Fredericksburg and Potomac Railroad Co.*, 90 F. (2d) 971; and also of the 2nd Circuit Court of Appeals in *Commissioner* v. *O. P. P. Holding Corporation*, 76 F. (2d) 11; and of the Chancery Division of the Supreme Court of Judicature of Great Britain in *In re Bodman*, L. R. (1891), 3 Ch. Div. 135.

Interest paid on borrowed money, of course, has a connection with all of the company's investments, including its investments in the United States, and, therefore, plaintiff is entitled to deduct a ratable part of this interest.

Entry of judgment will be delayed until the filing of a stipulation by the parties, or, in the absence of a stipulation, until the incoming of a report by a commissioner as to the correct amount due plaintiff, computed in accordance with this opinion. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge*, concur. WHALEY, *Chief Justice*, concurs in the conclusion.

In accordance with a stipulation filed April 10, 1941, judgment for the plaintiff was entered June 2, 1941, in the sum of $1,074.60 with interest from the date of the several payments, according to law.

NATIONAL FORGE AND ORDNANCE COMPANY v. THE UNITED STATES

[No. 44081. Decided March 3, 1941]

On the Proofs

Government contract; inspection of gun-tube forgings during manufacture.—Where plaintiff under contract with the Government made and delivered to the Washington Navy Yard six gun-tube forgings which were rejected by the Government for defects discovered by the defendant at various stages of manufacture, it is *held* that under the provisions of the contract and in accordance with established practice at the time the contract was entered into there was no obligation on the part of the defendant to make final inspection of said gun-tube forgings at any particular stage of manufacture into completed articles and the plaintiff is not entitled to recover.

The Reporter's statement of the case:

Mr. Pickens Neagle for the plaintiff.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

This suit is for the recovery of $36,198.77, an amount charged against plaintiff by the defendant, representing the cost of work performed by the defendant in its Naval Gun Factory at the Navy Yard, Washington, D. C., on six 8″ gun-tube forgings manufactured and furnished by plaintiff under a contract of March 11, 1933, with the Navy Department. The basis of the claimed right to recover this amount is that if the defendant had inspected the forgings immediately after the process of radial expansion (a part of the work which the contract contemplated would be performed by the defendant) the defects in the forgings would have been discovered, the forgings would then have been rejected, and the work subsequently performed thereon by the defendant would have been unnecessary, and, therefore, the cost to the defendant of the work performed on these forgings would not have been incurred and the amount mentioned would not have been a charge against plaintiff.

The defendant contends that all its acts and the procedure followed by it with reference to the six rejected gun forgings in question were authorized under, and were not in violation of, the provisions of the contract and specifications with plaintiff, and that plaintiff cannot recover the expense incurred by defendant representing the cost of work performed by defendant on the gun forgings prior to the time they were rejected for defects discovered.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. April 6, 1937, the Comptroller General of the United States stated an account against the plaintiff which included the sum of $36,198.77, representing the cost to the defendant of processes of manufacture on six gun forgings after radial expansion furnished by the plaintiff under contract NOd-420 with the defendant, and withheld that sum from sums otherwise due the plaintiff on another contract.

Contract NOd-420 was entered into March 11, 1933. The Secretary of the Navy was the contracting officer for the Government. The contract bound the plaintiff to furnish and deliver to the Navy Yard, Washington, D. C., 13 sets of 8″/55 gun forgings in accordance with designated specifications and drawings. Made a part of the contract were Ordnance Pamphlet No. 400 of May 1932 and Ordnance Pamphlet No. 9 as revised August 1918 and supplemented January 9, 1933. The contract and pamphlets are filed in evidence and made a part of these findings by reference.

Articles 3, 4, and 28 of the specifications, contract, and Ordnance Pamphlet No. 400, respectively, provided as follows:

> 3. Should the language of any part of the specifications be ambiguous or doubtful, the Bureau of Ordnance shall decide as to the true intent and meaning thereof.
>
> 4. *Inspection.*—(*a*) All material and workmanship shall be subject to inspection and test at all times and places and, when practicable, during manufacture. The Government shall have the right to reject articles which contain defective material or workmanship. Rejected articles shall be removed by and at the expense of the contractor promptly after notification of rejection.

(*b*) If inspection and test, whether preliminary or final, is made on the premises of the contractor or subcontractor, the contractor shall furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient inspections and tests required by the inspectors in the performance of their duty. All inspections and tests by the Government shall be performed in such a manner as not to unduly delay the work. Special and performance tests shall be as described in the specifications. The Government reserves the right to charge to the contractor any additional cost of inspection and test when articles are not ready at the time inspection is requested by the contractor.

(*c*) Final inspection and acceptance of materials and finished articles will be made after delivery, unless otherwise stated. If final inspection is made at a point other than the premises of the contractor or a subcontractor, it shall be at the expense of the Government except for the value of samples used in case of rejection. Final inspection shall be conclusive except as regards latent defects, fraud, or such gross mistakes as amount to fraud. Final inspection and acceptance or rejection of the materials or supplies shall be made as promptly as practicable, but failure to inspect and accept or reject materials or supplies shall not impose liability on the Government for such materials or supplies as are not in accordance with the specifications. In the event public necessity requires the use of materials or supplies not conforming to the specifications, payment therefor shall be made at a proper reduction in price.

28. During the progress of the work all material shall be subject to inspection for defects of material or workmanship, and all finished articles shall be rigidly inspected for defects of any sort in material, workmanship, fit, or efficiency.

In Navy Ordnance Pamphlet No. 9, Article 8 provided:

> * * * Forgings shall be free from seams, cracks, flaws, and foreign substances, and their uniform soundness and freedom from slag, streaks, cavities, segregations, and blowholes shall be of such degree as to insure their value and suitability for the purpose intended.

Article 20 thereof is as follows:

> Pieces that satisfactorily meet all the requirements of these specifications as to physical qualities and are satisfactory as to dimensions will be provisionally accepted

by the United States and be considered delivered, but will not be considered as finally accepted.

The inspector should promptly notify the contractor of the existence of any defect which, in his opinion, will make final acceptance of a piece doubtful, and should immediately condemn any piece having defects which are of such gravity as to certainly prevent final acceptance; but the final acceptance of a piece cannot be claimed because of any failure to discover defects at a particular time.

Pieces may be rejected at any period of machining or assembling for defects discovered or developed.

All of the test bars taken from a forging, as prescribed in Tables I and II, should give the physical qualities prescribed in Table V. The obligation is on the contractor to put the forging in proper physical condition before presenting it for official test, and the authority contained in this paragraph will not be used to save him the trouble or expense of so doing.

In the case of streaked forgings, that is, forgings showing striations of different colored metal, careful examination will be made to see if there is any lack of continuity of the metal along such streaks. Such lack of continuity determined by the breaking or parting of the chip in turning or in chiseling in the direction of the streak, or in any other manner, will cause the rejection of the forging.

Slag pockets and sand splits or cavities containing particles of slag, sand, or other foreign material will be treated as local physical defects in the steel, the seriousness of which will depend upon their location in the forging, their number per unit area of surface, their size and form, etc. If isolated and small their presence in a forging otherwise sound and satisfactory will not be deemed important; if in clusters or extending over a considerable surface, indicating a porous condition of the metal, the forging will be rejected.

The contractor shall replace without charge any piece which may be condemned at any time prior to or during proof firing of the gun.

If defects are developed in any of the gun forgings constituting a gun of such a character as to cause its rejection the actual expense incurred by the department for work done upon the defective material, and upon any other material whose rejection is necessitated by being assembled with the defective material, shall be borne by the manufacturer of the defective material.

Specifications for radial expansion forgings, supplemental to Navy Ordnance Pamphlet No. 9, were issued January 9, 1933, as follows:

> In manufacturing guns by the radial expansion method *the barrels* or *tube forgings* will be subjected to internal hydraulic pressures which will stress the outer surface of the forging to the prescribed elastic limit. The maximum dilation of the bore will not exceed 4 percent. Any abnormal dilations of the forging developed by the radial expansion processes indicate deficient physical qualities and will be cause for rejection.
>
> The physical requirements of the gun forgings are given on the respective forging drawings.

2. Radial expansion referred to in the preceding finding was a process of expanding the tube forgings hydraulically, and was performed by the defendant in the Navy Yard at Washington as a step in their manufacture into guns.

From the time the forging is received in the Naval Gun Factory at the Navy Yard it goes through some forty stages of machining and manufacture.

By successive operations the forging of the size here involved is bored smooth to an inside diameter of 7.51 inches and precisely gauged. The forging is set up in the lathe and turned to required outside diameters for radial expansion. After these and other detailed operations not necessary to mention, the forging is ready for radial expansion.

Radial expansion is a highly specialized process, hydraulic pressure being applied gradually and at successive intervals in and throughout the length of the bore. It has a "hooping" effect on the tube, putting the outer zones in tension that otherwise would be effected by winding wire or shrinking hoops around the tube. It conditions the metal by compression of inner layers and tension of outer layers. In this way the weight of the gun in proportion to its calibre may be materially reduced.

3. Prior to May 29, 1934, the rules, regulations, or specifications of the Navy Department did not call for or require inspection upon completion of radial expansion and it had not been the practice of Naval inspectors to examine the bore of the gun forging immediately after it had been expanded radially by hydraulic pressure for the purpose

of discovering any defects that might then be apparent. The established practice had been to examine the bore for defects every time metal was removed, the main reason therefor being that whenever metal is removed by boring a different area is encountered in which there may be defects not present in the area removed. There is no removal of metal in radial expansion and examination of the bore was not made thereafter, before additional machining.

4. In the spring of 1934 the Naval Gun Factory found that gun forgings on which it was working showed an increase in number of flakes. Flakes are physical defects in the steel, small transverse fissures, that are not always visible to the naked eye but constitute defects that if not removed may be cause for rejection of the forging. They may sometimes be removed entirely in the next boring of the gun, or if situated where a groove will be made in the process of rifling they may disappear in rifling the gun. Whenever such defects are discovered, the contractor is notified and he may either withdraw the forging and substitute another, or authorize the Naval Gun Factory to continue machining the gun at his own risk of final rejection upon failure of such machining to eliminate the defect.

Defendant's Naval officers, being concerned as to the prevalence of flakes in the forgings before them and considering complaints from the plaintiff of the absence of inspection after radial expansion, adopted on May 29, 1934, the practice of examining the gun forgings for defects immediately after radial expansion. This was in the midst of their work on plaintiff's forgings.

Compared with the situation presented where a different area is exposed by the taking off of metal in boring or turning, there are relatively few instances where defects in the physical structure of the forging, not discoverable before radial expansion, can be discovered immediately after radial expansion. Radial expansion as carried on at the Naval Gun Factory dilates the bore about two percent, but it is possible to carry it higher without injury to the forging. The magnitude of a two-percent dilation is relatively low. After expansion the forging is further processed, by boring, honing, rifling, plating, and it is finally proof-fired at the

Naval Proving Ground, which is a final rigorous test of the forging's acceptability.

5. The expense charged to the plaintiff, as to which it complains and for which it suffered the deduction mentioned in Finding 1, was on initial forgings for the following numbered guns. Their point of final rejection was as indicated:

Gun-number:	*Point of rejection*
549	Proof-firing.
551	"
552	8″ bore.
555	Proof-firing.
557	Rifling.
559	Proof-firing.

In none of the foregoing six forgings had the bore been lighted and inspected for defects after radial expansion and before the next step in manufacture. They had all been radially expanded prior to May 29, 1934, and other work had been performed thereon subsequent to expansion and prior to that date.

6. Forgings on guns 531, 548, 550, 553, and 554 were accepted on proof-firing which had not been bore-searched immediately after radial expansions.

The initial forgings for guns 556 and 558 were bore-searched immediately after radial expansion and, as a result of defects apparent on such inspection, were rejected.

Lighting of the bore and inspection thereof immediately after radial expansion of the initial forgings for guns 549, 551, 552, 555, 557, and 559 mentioned in finding 5 would not necessarily have resulted in their rejection by defendant's officers or their immediate withdrawal by the contractor. They passed inspection immediately after the next process in their manufacture, in which they were bored to a diameter of 7.85 inches, and no attempt was made by the contractor to withdraw them after passing such inspection. The final inside diameter of the forgings was 8 inches.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The question presented under the facts and the contract provisions set forth in the findings is whether plaintiff is entitled to recover the amount of $36,198.77 which was deducted and withheld by the defendant from payments otherwise due plaintiff, under another contract, to cover the cost to defendant of the work performed by it at the Naval Gun Factory on gun forgings made and delivered by plaintiff under contract NOd-420 of March 11, 1933, with the Navy Department, which forgings were finally rejected by the defendant for defects discovered at various stages of manufacture of the gun-tube forgings into complete articles. Plaintiff contends in support of its claimed right to recover the amount so charged against it that the work of radially expanding the gun forgings is a test of the physical qualities thereof; that an appropriate inspection by the defendant of the six rejected forgings should have been made by defendant after the radial expansion stage; that, in all probability, the defects for which these six forgings were ultimately rejected would then have been discovered as a result of that process; that as the Navy Department had, by the provisions of the contract, excluded plaintiff from opportunity of making its inspection for defects in the forgings after the application of that process the defendant obligated itself to conserve the plaintiff's interests involved by suitably inspecting the forgings itself at that stage; and that by its failure so to conserve plaintiff's interests it deprived itself of all right to charge against plaintiff's account the costs of the work thereafter done on the six forgings in question.

From the facts and contract provisions, we are of opinion that the cost of the work performed by the defendant at the Naval Gun Factory on the six gun-tube forgings furnished by plaintiff and finally rejected by the defendant for defects discovered at various stages of manufacture was properly charged to plaintiff. The original contract price of $156,373.67 for furnishing the gun-tube forgings in question, and others, had been paid to plaintiff by the defendant prior to the dates on which the six forgings in question were finally rejected. Under its contract of March 11, 1933,

plaintiff was required to deliver thirteen sets of 8″/55 gun forgings in strict accordance with the specifications and drawings furnished. These forgings were delivered by plaintiff to the Naval Gun Factory at Washington, D. C., and were provisionally accepted. Under the terms of the contract and specifications these forgings were thereafter to be finished by the defendant at its Naval Gun Factory. During performance of this work by the defendant, six of the forgings were rejected for defects discovered at various stages of manufacture of the gun-tube forgings, as delivered by plaintiff, into complete gun barrels. The six forgings rejected were numbered 549, 551, 552, 555, 557, and 559. The forging for gun 552 was finally rejected at completion of 8-inch bore; forging for gun 557 was rejected after rifling; and forgings for guns 549, 551, 555, and 559 were rejected after proof-firing. After these forgings had gone through the radial expansion stage, and various other work had been performed on them, the defendant discovered by accident that the forging for gun numbered 556 had developed major defects in the bore immediately after radial expansion, which defects did not exist before radial expansion. This discovery was not made as a result of an inspection of the forging by the defendant after radial expansion, as such inspection was not then and had not been customary, but such discovery was made by a workman who was cleaning this forging after it had been radially expanded. Major defects in the forging for gun numbered 558, subsequently radially expanded but not shown prior to radial expansion, were discovered upon inspection immediately after radial expansion. Both of these forgings were rejected, with the consent of plaintiff, because of the defects so discovered without any further work being done. Neither of these forgings is among those involved in this proceeding.

As a result of the information obtained, as above described, with reference to the two forgings for guns 556 and 558 in May 1934, the defendant, on May 29, 1934, changed its existing practice of inspecting the bore of the gun forgings by the use of a bore-searcher and a telescope every time metal was removed and inaugurated the practice

of inspecting gun forgings for defects immediately after the process of radially expanding the forgings had been applied. The changed practice, resulting in this additional inspection, was adopted by the defendant because of the information which had been disclosed concerning forgings 556 and 558, as above mentioned, and because the defendant was concerned about the prevalence of defects due to flakes in forgings then in process of manufacture and by reason of complaints which plaintiff had made about the absence of inspection immediately after radial expansion. At the time of this change other work was being performed by the defendant on the six forgings involved in this case, but sometime after all of them had been radially expanded and after they had reached other stages of machining for assembly and for final test. The established practice prior to and at the time of plaintiff's contract in March 1933 and thereafter until May 1934, of inspecting the bore of the gun forgings by the use of a bore-searcher and a telescope every time any metal was removed, was considered adequate to discover any defects resulting from the manufacturing process performed by the defendant of completing the forgings and assembling them into a complete gun, due to the fact that whenever metal is removed by boring a different area is encountered in which there may be defects not present in the area removed by such boring. The six forgings involved in this case were rejected because of defects developed at various stages of work performed by the defendant in the manufacture of such forgings into complete gun barrels; they were inspected by the defendant in strict accordance with the standard practice in effect prior to and at the time the contract was entered into with plaintiff and between the date of such contract and May 29, 1934.

We are unable to find in the contract and specifications with plaintiff any provision which required defendant, either expressly or by necessary implication, to inspect the gun forgings at any particular stage of manufacture as a condition precedent to the right of defendant under the contract to charge plaintiff with the cost of work performed by defendant on any forgings prior to rejection. Art. 28 of Ordnance Pamphlet 400 relating to inspection of forgings

as they were being made at plaintiff's plant provided that during progress of the work all material should be subject to inspection for defects of material or workmanship, and that all finished articles should be rigidly inspected for defects of any sort in material, workmanship, fit, or efficiency. Such inspection was made. Ordnance Pamphlet 400 contained no requirement as to when, or at what stage of manufacture of the forgings into complete gun barrels, inspection should be made at the Naval Gun Factory. Art. 20 of Navy Ordnance Pamphlet 9 provided that, upon delivery by plaintiff of the forgings, pieces satisfactorily meeting all the requirements of the specifications as to physical qualities, and were satisfactory as to dimensions, would be provisionally accepted by the defendant and would be considered delivered, but that they would not be considered as finally accepted. This article further provided that final acceptance of a piece could not be claimed because of failure of defendant to discover defects at any particular time, and that forgings might be rejected at any period of machining or assembling by defendant for defects discovered or developed. In view of these provisions of the contract, we think plaintiff cannot recover the amount charged against it, in accordance with Art. 20 of Navy Ordnance Pamphlet 9, for the cost of work performed by defendant on the forgings which were finally rejected. This article provided that if defects developed in any of the gun forgings, constituting a gun of such a character as to cause its rejection, the actual expense incurred by defendant for work done upon the defective material, and upon any other material whose rejection was necessitated by being assembled with such defective material, should be borne by the manufacturer of such defective material.

In addition to what has been said above, it should be pointed out that the record shows that if inspection of the six forgings finally rejected had been made immediately after radial expansion it would not necessarily have disclosed defects which were not apparent before radial expansion (findings 4 and 5). In view of these facts any conclusion that an inspection immediately after radial expansion would have disclosed at that time defects in the six forgings involved, sufficient to cause their rejection be-

fore any further work was performed on them by the defendant, would be purely speculative. For this reason we cannot sustain plaintiff's contentions (1) that had the rejected forgings been inspected immediately after radial expansion, the defects, for which those forgings were ultimately rejected, would in all probability have been discovered as a result of that process, and (2) that because of defendant's failure to make an inspection at that time it was deprived of all rights to charge against plaintiff the cost of work thereafter performed on these forgings.

Upon the evidence disclosed by the record, we cannot conclude that the defendant in any way breached its contract with plaintiff with respect to the six forgings in controversy in following the established practice, so far as these forgings were concerned, of inspecting the bore thereof immediately after metal was removed by boring or machining. Plaintiff's petition must therefore be dismissed, and it is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

FREDERICK W. SCHRAMM v. UNITED STATES

[No. 44433. Decided March 3, 1941]

On the Proofs

Income tax; dividend in liquidation received without restriction.— Where taxpayer in 1929 upon the liquidation of a corporation in which he was a stockholder received his share of the proceeds of the assets distributed in liquidation to the stockholders, said share so received representing a profit to said taxpayer, and included as income in taxpayer's income tax return for 1929; and where later, in 1931, the Commissioner advised the corporation of a deficiency in said corporation's income tax for 1928, due primarily to restoring to 1928 gross income the profit on sale of the assets of the corporation transferred to the trustee in liquidation and sold by said trustee in 1929; and where taxpayer contributed his share of the amount contributed by the distributees to pay said corporation's tax plus interest; it is *held* that the amount of the liquidation dividend distributed to the taxpayer in 1929 was received by

him without restriction or limitation on its use and disposition, was acquired under a claim of right and without knowledge of any infirmity of title, was income to taxpayer for that year, and plaintiff is not entitled to recover. *North American Oil* v. *Burnet*, 286 U. S. 417, 424 cited.

The Reporter's statement of the case:

Mr. B. Bayard Strell for the plaintiff.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. During the years 1923 to 1925, plaintiff purchased 102 shares of the capital stock of Schramm Manufacturing Company. On January 10, 1928, plaintiff purchased an additional 102 shares, increasing his holdings to 204 shares out of 1,000 shares outstanding. These shares were purchased at an aggregate price of $20,400.

2. On December 31, 1928, the Schramm Manufacturing Company was dissolved and its assets transferred to a trustee who was to liquidate them and distribute the proceeds to the stockholders. The distribution of the proceeds was made by the trustee during the year 1929 and plaintiff received as his share of such distribution $52,110.26, representing a profit to him over the purchase price of $31,710.26.

3. On March 12, 1930, plaintiff filed his income-tax return for the year 1929, showing a net taxable income of $38,-729.84, included in which were items totaling $31,670.26, reputedly representing plaintiff's profits from the liquidation of the Schramm Manufacturing Company. The tax disclosed by the return was paid in installments as follows:

March 12, 1930	$595.83
June 16, 1930	595.83
September 10, 1930	595.82
December 13, 1930	595.82

Upon examination by the Bureau of Internal Revenue of the plaintiff's return, an additional tax of $172.41 was assessed, which, together with interest of $16.86, was paid October 30, 1931.

4. By a letter dated February 24, 1931, the Commissioner of Internal Revenue advised the Schramm Manufacturing Company of a deficiency in tax of $21,137.36 for the year 1928, due primarily to restoring to 1928 gross income the profit on the sale of the assets of the corporation transferred to the trustee and sold by him in 1929. Since the corporation possessed no assets in 1931 from which to pay this tax, the distributees of the proceeds of the sale contributed to the corporation sufficient funds to pay the tax plus interest thereon, and plaintiff contributed in that year as his share the sum of $4,868.05. In the year 1934 it was stipulated by the interested parties and the Commissioner of Internal Revenue that, since the sale of the corporate assets had taken place in 1929, the deficiency was properly assessable for that year rather than 1928. As a result of that agreement, the corporation received a refund, of which plaintiff's share amounted to $720.93.

5. On December 15, 1931, plaintiff filed a claim for refund for the year 1929 with the Collector of Internal Revenue at St. Louis, Missouri, in the amount of $660.54, assigning the following grounds therefor:

> This taxpayer was a stockholder in the Schramm Mfg. Co., and as such received a share of the physical assets when said company was dissolved prior to the close of 1928. These assets were later sold at a considerable profit, and this taxpayer's share thereof was duly reported as income. The Commissioner contends this income belonged to the corporation; that the corporation should have paid a tax thereon of approximately $24,000.00. It follows that, if the Commissioner is correct, then this taxpayer has overpaid his tax by his proportionate share of this $24,000.00.

6. Plaintiff's claim for refund was rejected by the Commissioner of Internal Revenue December 1, 1936, on the ground that the income taxed was received under a claim of right and without restriction as to its disposition, and as the plaintiff kept his books on the cash receipts and disbursements basis, was taxable in the year in which it was received notwithstanding the plaintiff might subsequently have been required to pay part of the amount received to another.

The court decided that the plaintiff was not entitled to recover.

OPINION *per curiam:*

The sole question presented to the court for determination is whether profit derived by the plaintiff during the year 1929 as a liquidating dividend was properly included in his gross income for that year in its entirety, notwithstanding the fact that he was obliged to return a portion thereof to the corporation during the year 1931 to satisfy an additional assessment by the Commissioner for the year 1928. The findings show that the amount of the liquidating dividend distributed to the plaintiff in 1929 was received by him without restriction or limitation on its use or disposition. It was acquired under a claim of right and without knowledge of any infirmity of title. As this situation existed at the close of the year 1929, the amount of profit in the liquidating dividend constituted income for that year.

The fact that plaintiff during the year 1931 was obliged to restore to the corporation a portion of the amount received by him in 1929 to satisfy in part an additional assessment by the Commissioner of Internal Revenue for the year 1928 does not alter the amount of plaintiff's gross income for the year 1929 but may afford a basis for a deduction from gross income in 1931.

In *North American Oil* v. *Burnet*, 286 U. S. 417, 424, the Supreme Court said:

> If a taxpayer receives earnings under a claim of right and without restriction as to its disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent [citing other authorities].

The rule laid down above has been followed in other cases and repeated by the Supreme Court in *Heiner* v. *Mellon*, 304 U. S. 271.

Plaintiff's petition must be dismissed and it is so ordered.

Reporter's Statement of the Case

ESSLINGER'S, INC., v. THE UNITED STATES

[Nos. 44309 and 44628. Decided March 3, 1941]

On the Proofs

Excise tax on beer and ale; accuracy of measurement and computation.—It is *held* that upon the facts disclosed by the record plaintiff has not established that the determination of the Commissioner of Internal Revenue with respect to plaintiff's tax liability for the periods involved was erroneous or that plaintiff has overpaid the excise tax due by it because of any established inaccuracy in the meters used in measuring the beer and the ale produced for the purpose of computing the excise tax imposed by and payable under the provisions of section 608 of the Revenue Act of 1918, as amended by section 9 of the Liquor Taxing Act of 1934.

The Reporter's statement of the case:

Mr. Stanley Worth for the plaintiff.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

Plaintiff seeks to recover alleged overpayments of excise tax imposed by section 608 of the Revenue Act of 1918 as amended by section 9 of the Liquor Taxing Act of 1934 in the amounts of $5,570 in case No. 44309 for the period October 18, 1935, to April 30, 1936, and $15,466.30 in case No. 44628 for the period May 1, 1936, to June 20, 1938. The tax was paid at the rate of $5 a barrel on 246,000 barrels of beer, produced as shown by meters installed in pipe lines through which the beer was transferred from plaintiff's brewery to its bottling house for consumption or sale.

Plaintiff contends that the Commissioner of Internal Revenue determined and exacted a tax for the periods mentioned on a greater number of barrels of beer than it manufactured in its brewery and transported to its bottling house, and this contention is based upon the claim that the Commissioner's decision was erroneous because it was based upon the results disclosed by the meters which plaintiff

alleges did not accurately measure the number of barrels of beer actually produced and transported through such meters from its brewery to its bottling house.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff was incorporated March 27, 1907, under the laws of the Commonwealth of Pennsylvania, with its principal office and place of business at 10th and Callowhill Streets, Philadelphia. It is engaged in the manufacture and sale of fermented malt liquor and was so engaged during the period material to these suits.

2. The suits are for alleged overpayments, with interest, of the excise tax of $5 a barrel of 31 gallons imposed by Section 608 of the Revenue Act of 1918, as amended by Section 9 of the Liquor Taxing Act of 1934, with respect to fermented malt liquor transferred from plaintiff's brewery to its bottling houses. The first case, No. 44309, relates to the period October 18, 1935, to April 30, 1936. The second, No. 44628, relates to the period May 1, 1936, to June 20, 1938. The two cases were consolidated for hearing and decision.

3. At all times during the periods involved herein plaintiff transferred beer by sealed pipe line from its brewery to its bottling houses for the purpose of bottling. Meters were attached to the pipe lines in the bottling houses at approximately the point where the beer entered the bottling houses for the purpose of measuring the quantity of beer thus transferred. The tax herein involved was paid by canceling stamps purchased by plaintiff in advance according to meter readings as to the quantities of beer transferred to the bottling houses.

4. Prior to December 4, 1936, plaintiff had three bottling houses, two of which were served by one meter, #519. The other was served by meter #270 until it was replaced, February 25, 1936, by meter #34–6193, which is still in use. The only meters approved by the Alcohol Tax Unit for use by brewers were those manufactured by the Pittsburgh Equitable Meter Corporation and by the Bowser Company. Plaintiff's meters #270 and #519 were Pittsburgh meters and its meter #34–6193 was a Bowser meter. All meters

are purchased by brewers under a standard beer meter contract, with guaranties as to performance and capacity.

5. The pipe lines and the meters were sealed by Government seals from the brewery to the meters, and plaintiff had no control of the beer between those two points. After passing through the meters the beer was within the control of plaintiff. The meters were the means by which the Government obtained a check as to the amount of beer removed from the brewery to the bottling house for the purpose of bottling or otherwise.

6. Prior to December 4, 1936, plaintiff's beer was pumped directly through the meter to the filler of the bottling machine. On that date, so-called rest tanks were completed and put into use by plaintiff, and since then all the beer for bottling or canning has been pumped through one meter to the rest tanks and from the rest tanks pumped to the filler of the bottling or canning machine, as required.

7. Each of plaintiff's meters has two counters. The counter records the number of full barrels, ⅛ barrels and $\frac{1}{80}$ barrels, the latter having five horizontal lines across each number, each line representing $\frac{1}{400}$ barrel. One counter is continuous and is the basis for reporting tax paid barrels on Treasury Department daily form 139, and is sometimes called the Government meter; the other may be set back by the brewer at the end of the day. The counters record only in a forward motion and are unaffected by beer or water run through in reverse. This permits the reverse flushing of the meter with water without affecting the counters.

8. The meters are sealed and may be adjusted only by a meter inspector of the Alcohol Tax Unit. The meter is never taken out of the line for calibration, and is tested by a master meter which, for the purpose, is connected in series, and water is then passed through both meters at a rate of flow intended to be approximately the same as that used by the brewer. An inspector and an assistant conduct each test and each is covered by a written report. Generally two tests are run, an initial test to ascertain its accuracy and condition, and a final test and adjustment, using five barrels or more of water for each, though intermediate tests are sometimes made.

9. The master meters used in testing are adjusted, calibrated, and sealed by the Bureau of Standards in Washington. Prior to October 29, 1937, the instructions were that master meters should be returned to the Bureau of Standards after making thirty tests, but on that date the Bureau decided to have fifty tests, instead of thirty, covering a period of about one and one-half to two months. When the master meter is forwarded to the Bureau of Standards by the inspector he has no knowledge of the extent to which the master meter is functioning inaccurately nor does he know what adjustment was made by the Bureau of Standards before it was finally recalibrated as shown by what is called a "curve sheet," made a part of this finding by reference as plaintiff's Exhibit No. 36.

10. The inspectors are equipped with a stop watch and with a chart or table showing the rates of flow from 5 to 120 gallons a minute computed according to the number of seconds it requires 1/8 barrel of liquid to pass through the meter. The rate of flow to be used in testing is usually ascertained by asking a brewery official the rate of flow used by the brewery, and some inspectors rely entirely on this information. Other inspectors make their own determination as to rate of flow, or obtain it from prior records of the Bureau, as well as by inquiry of an official of the brewery. Having determined the rate of flow to be used, the inspectors, by manipulating valves, control the flow during the test. Before commencing the test, the set-back dials on both the brewer's meter and the master meter are turned back to zero. After concluding the test the difference in 400ths of a barrel between the quantities shown by the master meter and by the brewer's meter is reduced to a percentage, after which the percentage of error of the master meter at the rate of flow used, as shown by the curve sheet, is applied, and the result is the degree of error of the brewer's meter as computed by the inspector, which is the accepted and an efficient method of making the required test of the meters.

11. Two inspectors reported to the District Supervisor in Philadelphia on October 22, 1935, that the average rate of flow through plaintiff's meters #270 and #519 was 22 gal-

lons a minute when bottling quarts and 16 gallons a minute when bottling pints.

12. Plaintiff was not furnished with copies of reports of tests of its meters, and in response to its request of November 11, 1937, received on November 16 the following reply from the Alcohol Tax Unit:

> DEAR SIRS: Receipt is acknowledged of your letter of November 11, 1937, requesting information regarding results of meter tests made at your brewery from October 15, 1935, to date.
>
> At the time meter tests are made there is no objection to brewers obtaining, upon requests, verbal information as to the findings from the inspectors making the tests. It is not the practice of this office to go back and check our records of these tests for the information of brewers, on account of the time required therefor.
>
> If you believe, however, that more tax has been paid on the beer removed than that properly due, claim for refund of tax should be filed with the Collector of Internal Revenue in the usual manner on Form 843. Furthermore, you are advised that in passing on claims of this kind it is customary to check back on meter tests for the period covered by the claim.

13. During the periods involved herein plaintiff's meters were frequently tested and whenever a meter was shown to be registering the flow of beer within a tolerance of $\frac{4}{10}$ of 1% of accuracy, either plus or minus, there was no correction or adjustment made on such meter. However, when a meter was shown to be registering beyond a degree of accuracy of $\frac{4}{10}$ of 1%, either plus or minus, the meter was dismantled and cleaned, then retested and adjusted to underregister in favor of the plaintiff within the degree of $\frac{4}{10}$ of 1% of accuracy. The above procedure was followed not only with respect to the plaintiff but generally in the entire brewing industry and was a usually-recognized method.

14. During the period prior to December 4, 1936, when the beer was pumped directly through the meters to the bottling units (Finding 6), if the operation of the bottling machinery was stopped for any reason there was often observed a momentary back surge of beer from the filler through the meter due to greater counter pressure at the filling machine than at the storage tanks. The amount of

any back surge was never determined by plaintiff and, so far as the record shows, was not susceptible to measurement. Upon resumption of operation the beer would again be pumped forward through the meter and be reregistered. Plaintiff had as part of its equipment a booster pump for the purpose of regulating and equalizing the pressure but its efficient action was dependent upon the experience and care of the person who operated the machinery, and this back surge of beer was the result largely of a lack of efficient operation of the machinery or pump when the bottling machine was stopped. After the installation of "rest tanks" December 4, 1936, there was no further back surge observed, and none could occur that would involve meter registration.

15. Upon the filing of plaintiff's claim for refund referred to above, an investigation was made by Government inspectors for the period October 18, 1935, to June 20, 1938, to ascertain the number of barrels of beer transferred to the bottling house, on the basis of meter tests heretofore described, from the date of one meter test to each succeeding meter test within this period, based upon the percentage of meter errors disclosed by those tests. The number of barrels of beer so transferred was determined by dividing the number of barrels as shown by the brewery meter to have been transferred to the bottling houses by 100% plus the percentage of meter error when the meter was shown to have been over-registering, or 100% minus the percentage of meter error when the meter was shown to have been under-registering. The product obtained by multiplying the above quotient by 100, minus the number of barrels as registered by the meter, thus showed the amount of beer removed to the bottling houses in excess of that recorded on the meter and consequently under-tax paid. For example, on April 22, 1936, meter #519 was shown to be under-registering $\frac{4}{10}\%$ but had registered 6,812 barrels of beer as having been transferred. Therefore—

100% minus .4% equals 99.60%;
6,812 divided by 99.60 equals 68.3935;
68.3935 x 100 equals 6,839.35;
6,839.35 minus 6,812 equals 27.35 barrels under-tax paid.

The number of barrels of beer less than recorded on the meters as transferred to the bottling houses and consequently over-tax paid was determined by taking the number of barrels recorded by the meters as thus transferred minus the product obtained by multiplying the above quotient by 100. For example, February 3, 1936, meter #519 was shown to be over-registering 4/10% and had registered 12,163 barrels of beer as having been transferred. Therefore—

> 100% plus .4% equals 100.4%;
> 12,163 divided by 100.4 equals 121.1454;
> 121.1454 x 100 equals 12,114.54,
> 12,163 minus 12,114.54 equals 48.46 barrels over-tax paid.

The method above described is the method generally accepted as fair throughout the brewing industry and is the best devised over a period of time in the interest of accuracy, being a determination of the amount of tax-paid beer by test of the meters.

In applying the above method, the Commissioner determined from the information set forth in the reports of meter inspections that for the periods involved herein the number of barrels of beer under-tax paid based on the percentage of meter error was 635.09 barrels and that on the same basis the number of barrels of beer over-tax paid was 182.83 or a net total under-tax paid of 452.26 barrels for which an additional tax of $2,261.30 was assessed and paid by plaintiff November 21, 1938.

In making the additional assessment in the manner as aforesaid allowance was given for the entire period involved for any drifts or discrepancies in the meters as shown by the master meter tests above described.

Letters were written to plaintiff by the Alcohol Tax Unit, Treasury Department, on May 31 and September 12, 1935, prior to the taxable periods here involved which are, respectively, as follows:

> An inspector's report reveals that your Pittsburgh meters, Nos. 270 and 519, do not meet the requirements of the Bureau with respect to accuracy.
>
> It is, therefore, requested that you get in touch with the meter manufacturer and have the necessary adjustments made immediately.

In the meantime, tax-payment of beer for bottling purposes must be made from the Government bottling tanks.

A recent test of your Pittsburgh Meters Nos. 270 and 519, by the Master Meter, showed that Meter No. 270 is unsatisfactory mechanically, having jumped approximately 2% in registration over a period of two weeks. It is therefore suggested that the factory be notified regarding this meter and this office advised when adjustment has been made.

You will continue to tax-pay from the Government Bottling Tanks pending either replacement or repairs to Meter No. 270.

16. Paintiff filed with the Collector of Internal Revenue, Philadelphia, June 2, 1938, a claim for refund in the sum of $5,570, based upon an alleged over-registration of its meters during the period October 18, 1935, to April 30, 1936. The Commissioner of Internal Revenue rejected the claim by letter of September 2, 1938, as follows:

Your claim for refund of $5,570.00 representing an alleged overpayment of tax on beer transferred to the bottling house during the period from October 18, 1935, to April 30, 1936, has been considered.

You contend that during the above-mentioned period 34,313 barrels of beer were tax-paid on meter readings, whereas the actual quantity on which tax should have been paid did not exceed 33,199 barrels, based on the actual yield in cases of beer bottled, giving full effect to wastage in bottling and the quantity consumed in the bottling house. You, therefore, request a refund of tax on the difference of 1,114 barrels at $5.00 per barrel, or $5,570.00.

An investigation covering meter operations at your brewery has been made by an inspector from the office of the District Supervisor at Philadelphia, Pennsylvania, from the date the meter was installed to June 20, 1938, and there is attached hereto a statement showing the dates on which the meters were tested, the percentage of meter error, the number of barrels of beer transferred from the date of one test to the date of the succeeding test, the quantity of beer over tax-paid and the quantity of beer under tax-paid. You will note that during the entire period of meter operations there was no overpayment of tax but rather an underpayment

of tax on 452.26 barrels, on which tax would amount to $2,261.30.

It appears that the loss on which you request refund of tax represents a loss sustained in bottling operations, and for which the law makes no provision for refund. Therefore, your claim is rejected.

Section 608 of the Revenue Act of 1918, as amended by the Liquor Taxing Act of 1934, imposes a tax of $5.00 per barrel on all beer removed from the brewery premises. The enclosed statement shows that 452.26 barrels of beer were transferred from the brewery to the bottling house without payment of tax. An assessment will, therefore, be made against you on the Distilled Spirits List of the Collector of Internal Revenue for the First District of Pennsylvania, in the amount of $2,261.30, to cover the tax due.

17. On December 21, 1938, plaintiff filed with the collector a claim for refund of $15,466.30, representing an alleged overpayment of original tax paid due to alleged over-registration of its meters during the period May 1, 1936, to June 20, 1938, of $13,205, plus the additional tax of $2,261.30. This claim was rejected by the Commissioner by letter dated February 20, 1939, for reasons stated in his letter dated September 2, 1938, *supra*.

18. In computing the additional tax of $2,261.30 the method assumes that the degree of error at which the meter was functioning when the respective tests were made, as indicated by the respective initial tests, had been the same since the previous initial test, even though at such time the meter was admittedly not registering with absolute accuracy, whether over- or under-registering. If the initial test showed the meter to be dirty, it was assumed that it had been dirty since the previous test, since which date it had not been disturbed.

When plaintiff claimed a refund, the Commissioner directed that a recheck be made of the registrations, and he made an additional assessment based on the calculation showing underpayment of tax during the period involved. The Commissioner would not have made an additional assessment on account of meter registrations if plaintiff had not filed a claim for refund and if the consequent investigation had not revealed an underpayment of tax covering the period involved.

19. Perfect production from one barrel of 31 gallons is 13.77 cases, 24 bottles each, of pints, or 10.33 cases, 12 bottles each, of quarts. It is possible to get perfect production. Plaintiff's brewery renders a daily production record showing the raw materials used in producing the number of barrels of finished products that day. Plaintiff also makes computation of the number of barrels tax-paid and removed to the bottling house through each meter. The latter information checks with Treasury Department form 139 as to number of barrels tax-paid each day according to each meter. Form 139, together with data as to brewery production, is summarized at the end of the month on Treasury Department form 103 which is filed with the Collector.

20. During the period ending May 1936, the production in number of cases bottled each day was obtained by plaintiff by counting the cases and checking the count by the crown account. From May 1936 to October 1937 the production was computed by weighing on a large Fairbanks scale with graduations no smaller than ¼ lb., the crowns that were sent to the bottling units in large original cartons, then weighing the empty cartons the following day, then mathematically computing the number of crowns used by deducting the weight of the empty cartons from the total weight and dividing the remainder by 142, which was approximately the number of crowns per pound, although the number of crowns per pound varied from time to time. The computation was never made except in terms of pounds, and discrepancies were discovered between what the crowns should have figured as production and what tests of production showed. About every two weeks test counts were made of the number of crowns per pound. Inventory was taken every Saturday afternoon of the cases of bottled beer on hand. Since October 1937 the daily production in cases has been counted and checked with the crown report.

There is no satisfactory evidence as to the number of cases of ale or beer bottled, or the number of crowns, lids, or tax-paid barrels, nor as to the number of cases of beer consumed on the premises, or the amount of beer lost through overfilling of bottles and the use of oversize bottles, or other losses through spillage occurring at plaintiff's plant

during the periods involved. During the latter portion of the period covered by plaintiff's claims a more accurate record of the production of the cases of beer and the crown account was kept.

21. A comparison of tax-paid barrels, number of cases bottled, including those damaged, stated in the equivalent of pints and yield during certain periods, based on plaintiff's method of computation, follows:

	August–November, 1936, inclusive	December 1936 to June 20, 1938
Barrels, tax-paid	35, 209	150, 029
Production in cases bottled including damaged	473, 710	2, 044, 666
Rate of yield	13. 45	13. 63

22. The following results were shown with respect to meter #519 for the month of May 1936:

	Barrels, tax-paid	No. cases bottled	Rate of yield [1]		Barrels, tax-paid	No. cases bottled	Rate of yield [1]
May:				May:			
1	134	1, 803	13. 46	16	265	3, 613	13. 65
2	131	1, 749	13. 35	18	264	3, 598	13. 63
4	132	1, 771	13. 42	19	260	3, 572	13. 74
5	122	1, 621	13. 28	20	134	1, 756	13. 10
6	131	1, 750	13. 36	21	263	3, 527	13. 41
7	132	1, 765	13. 37	22	262	3, 570	13. 62
8	133	1, 778	13. 37	23	130	1, 696	13. 04
9	133	1, 784	13. 41	25	239	3, 246	13. 58
11	117	1, 558	13. 31	26	237	3, 234	13. 64
12	181	2, 425	13. 39	27	232	3, 164	13. 63
13	240	3, 271	13. 63	28	255	3, 473	13. 62
14	224	3, 044	13. 59	29	132	1, 762	13. 35
15	265	3, 620	13. 66				

[1] Exclusive of damaged.

23. Plaintiff's bottling house operated normally 7½ hours a day. The bottling-house employees were allowed, by agreement with their Union, ten minutes each morning and afternoon as "drinking time."

24. Beer was freely consumed in the bottling houses of plaintiff during the periods involved herein. Beer was frequently lost during these periods through accident or otherwise; for example, chipped bottles passing through the bottling machine causing beer to spurt out at the crown, breakage of bottles in the pasteurizer, overflow at

the bottling machines because of improper counter pressure thereat, jamming of filler spout at bottling machine, improper filling of bottles at the filler necessitating auxiliary filling from bottle to bottle by hand and consequent spillage, and from other causes of which it is not possible to keep any record in the brewery.

25. During the periods involved herein, plaintiff kept no records as to the quantity of beer consumed by its employees in its bottling house, or otherwise, or as to the amount of beer lost by causes enumerated above, except as to beer lost through breakage.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The essential facts established by the record and material to the issue presented in these cases are set forth in the findings. The question presented concerns the correctness of the method employed by the Treasury Department in determining the measure of plaintiff's liability for the excise tax imposed by section 608 of the Revenue Act of 1918 as amended by section 9 of the Liquor Taxing Act of 1934, and, in the last analysis, the question is whether plaintiff has proven that it overpaid the excise tax due by it on beer which it manufactured in the amounts claimed, or in any determinable amount.

We are of opinion upon the facts disclosed by the record that plaintiff has not established that the determination of the Commissioner of Internal Revenue with respect to its excise tax liability for the periods involved was erroneous, or that it has overpaid the excise tax due by it because of any established inaccuracy in the meters used in measuring the quantity of beer and the ale produced for the purpose of computing the excise tax imposed by and payable under the provisions of the revenue statutes above mentioned. Section 608 of the Revenue Act of 1918 (40 Stat. 1057, U. S. Code, Title 26, sec. 1150 (a)) as amended by section 9 of the Liquor Taxing Act of 1934 (48 Stat. 313, U. S. Code, Title 26, sec. 1330), provided as follows:

> That there shall be levied and collected on all beer, lager beer, ale, porter, and other similar fermented liquor, containing one-half of one per centum, or more, of alcohol, brewed or manufactured and hereafter sold, or removed for consumption or sale, within the United States, by whatever name such liquors may be called, in lieu of the internal-revenue taxes now imposed thereon by law, a tax of $5.00 for every barrel containing not more than thirty-one gallons, and at a like rate for any other quantity or for the fractional parts of a barrel authorized * * *.

Section 607 of the Revenue Act of 1918, *supra*, provided as follows:

> That the Commissioner, with the approval of the Secretary, is hereby authorized to require at distilleries, breweries, rectifying houses, and wherever else in his judgment such action may be deemed advisable, the installation of meters, tanks, pipes, or any other apparatus for the purpose of protecting the revenue, and such meters, tanks, and pipes and all necessary labor incident thereto shall be at the expense of the person on whose premises the installation is required. Any such person refusing or neglecting to install such apparatus when so required by the Commissioner shall not be permitted to conduct business on such premises.

Pursuant to section 607, the Commissioner of Internal Revenue promulgated Treasury Regulations 18, paragraphs (a) to (g), inclusive, and 21 and 23, relating to the installation, use, and inspection of meters for the purpose of measuring beer manufactured and withdrawn for purposes of the tax, par. 12 (a) of this regulation being as follows:

> Brewers shall be required to provide meters for the measurement of beer withdrawn for tax payment, which meters shall be accessible to government officers at all reasonable hours during which the brewery is operating. Supervisors shall furnish brewers with a list of manufacturers whose meters conform to the prescribed specifications and have been approved.

Prior to the periods of the claims here involved in these cases two types of meters were approved by the Commissioner of Internal Revenue and the Secretary of the Treasury, and by contract between the brewer and the manu-

facturer these meters were guaranteed for a period of one year within a tolerance of 0.4% of accuracy. Approved meters were installed and used by plaintiff in its brewery and these were, during the periods involved, constantly and regularly inspected in accordance with regulations. The excise tax paid, a portion of which is here sought to be recovered, was determined and computed by the Commissioner from information disclosed by these approved meters as to the number of barrels of beer produced by plaintiff during the periods involved. This is the only independent means by which the defendant might after the beer had been produced and removed, or may now check the amount of beer removed from breweries for the purpose of bottling for the trade. Prior to October 17, 1935, when the meters installed for use by plaintiff were approved, Government calibrated tanks, to each of which was attached a telegauge, were used for the purpose of measuring beer produced for purpose of the excise tax to be collected. This latter method was subject to so many variable factors that it was found to be unsatisfactory and was abandoned. After that time approved meters were used instead. Frequent tests were made of these meters by master meters calibrated and sealed by the U. S. Bureau of Standards, and such tests were regularly made of plaintiff's meters. When a meter was found to be registering the flow of beer within a tolerance of 0.4% of accuracy, either plus or minus, no correction or adjustment of such meter was made, but when the meter showed to be registering beyond such tolerance, either plus or minus, it was dismantled, cleaned, retested, and adjusted to under-register in favor of plaintiff within the degree of tolerance of 0.4 of 1%. The record shows that this procedure was followed not only with respect to plaintiff's operations but it was followed generally in the entire brewing industry. It was the usually recognized and approved method. Reports of the tests made of the meters were and are kept by the Alcohol Tax Unit of the Bureau of Internal Revenue. Upon the filing of a claim for refund, the Commissioner under the established and customary practice of his office, makes an investigation of the claim, which investigation is not necessarily confined to

the period covered thereby, and to the extent the investigation supports the claim a refund is made. If the investigation made does not support the claim, or if such investigation discloses an additional tax due for a period covered by the investigation greater than the period covered by the claim, the refund claim is denied and the additional tax found to be due is assessed and collected. This procedure was followed in plaintiff's case, and inasmuch as an underpayment of tax was indicated for the period October 18, 1935, to June 20, 1938, of $2,261.30, the claims filed by plaintiff were denied and this additional tax was assessed and paid. In determining this underpayment for the period mentioned, the Commissioner ascertained the number of barrels of beer transferred from plaintiff's brewery to the bottling house on the basis of the meter tests described in the findings from the date of one meter test to the date of each succeeding meter test within the period, based upon the percentage of meter errors disclosed by these tests. The formula used in determining the amount of underpayment of tax is set forth in finding 15. By applying this method the Commissioner determined from the information available to him, and the information set forth in the regular reports required by the regulations of meter inspectors, that for the periods involved herein the number of barrels of beer on which the tax had not been paid, based upon the percentage of meter errors, was 635.09, and that on the same basis 182.83 barrels had been over-tax paid, or a net total under-tax paid of 452.26 barrels, for which the additional tax of $2,261.30 was assessed.

Although the meter method of measuring beer for tax purposes may be subject to some criticism on the ground that it is not infallible and may not disclose in every case the exact number of barrels of beer that had passed through the meters at any given period, the record shows, and we have found as a fact, that the method used in plaintiff's plant, upon the basis of which the Commissioner made his determination, is generally accepted as fair throughout the brewing industry and is the best devised over a period of time in the interest of accuracy in determining the amount of beer, by meter tests, for the purpose of measuring the

amount of tax to be paid. The use of meters was specifically authorized by section 607 of the Revenue Act of 1918, *supra*. The record also shows, and we have found as a fact, that in deciding plaintiff's claim for refund and in determining and assessing the additional tax, the Commissioner of Internal Revenue made allowance for the entire period involved for any drifts or discrepancies in the meters as shown by the master-meter tests. While certain meter tests disclosed that plaintiff's meters were at times out of adjustment, this fact alone does not establish plaintiff's right to recover any determinable amount of tax paid in view of other facts established by the record and found, as above mentioned. *Mangone Co.* v. *United States*, 73 C. Cls. 239.

Plaintiff places emphasis upon the element of back surge of beer through the meters prior to the installation on December 4, 1936, of rest tanks between the meters and bottling houses. Subsequent to the installation of these tanks, any back surge would not affect the meters. Prior to December 1936, when the pumping machinery was stopped, there was observed under certain conditions some back surge which probably affected to some undetermined extent the amount of beer measured by the meters. The record establishes, however, and we have found as a fact, that plaintiff had, as a part of its equipment, a booster pump for the purpose of regulating and equalizing pressure between the bottling machine in the bottling house and the storage tank in the brewery from which the beer was pumped through the meters, but the efficient action of this booster pump was dependent upon the experience and care of the person operating the machinery, and this back surge of the beer was the result largely of inefficient operation of the pump when the bottling machine was stopped. The extent of the effect upon the meters of this back surge cannot be ascertained inasmuch as there are too many unknown factors present, such as the number of stops made in bottling operations, the different pressures at the pumps and tanks, and the length of the pipe between the pumps and tanks. If the amount of back surge had been ascertained by plaintiff, or was ascertainable on any reasonable basis, it seems clear

that the Commissioner of Internal Revenue would not have refused to make a refund to plaintiff to that extent. As the record stands, any overpayment resulting from back surge of beer through the meters would have to be based on conjecture and speculation.

Plaintiff also claims that the amount of tax due by it on the beer produced could have been determined and measured by its production records, but the record before the court fails to contain sufficient evidence to show the reliability or accuracy of such production records. On the contrary, the facts show that plaintiff's production records during the period involved were based in part upon estimates and were otherwise inaccurate, and that there is no satisfactory evidence as to the number of cases of ale or beer bottled or as to the number of crowns, lids or taxpaid barrels during the period involved in these suits (finding 20).

For the reasons stated, plaintiff is not entitled to recover and the petitions are dismissed. It is so ordered.

WHITAKER, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

THE FAMILY AID ASSOCIATION OF THE UNITED HOUSE OF PRAYER FOR ALL PEOPLE v. THE UNITED STATES

[No. 44488. Decided March 3, 1941]

On the Proofs

Income tax; exemption of fraternal beneficial association not local in character.—The plaintiff, incorporated as a fraternal beneficial association, with membership confined to members of a certain church, or religious denomination, which had local churches in several States, and not organized or operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, is not exempt from income taxes under section 103 (10) of the Revenue Act of 1929 and the same section of the Revenue Act of 1932, since it is not an association "of a purely local character" (Internal Revenue Code, sec. 101 (10)).

Same; exemption of fraternal beneficial association not operating under the lodge system.—Where the testimony shows that the entire activities of a fraternal beneficial association were the collections of dues from the members, the making of assessments against them when a member died, and the payment of sums for funeral expenses upon the death of a member, and there is no testimony to show that said association operated under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, plaintiff is not exempt from income taxes under section 103 (3) of the Revenue Act of 1928 and the same section of the Revenue Act of 1932 (Internal Revenue Code, sec. 101 (3)).

The Reporter's statement of the case:

Mr. Howe P. Cochran for the plaintiff. *Miss Margaret F. Luers* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, The Family Aid Association of the United House of Prayer for All People, was organized in 1930 under the provisions of chapter 18, subchapter 12, of the Code of Law for the District of Columbia (31 Stat. 1310), which reads in part as follows:

> A fraternal beneficial association is hereby declared to be a corporation, society, order, or voluntary association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit, having a lodge system with ritualistic form of work and representative form of government, making provision for the payment of benefits in case of death. * * *

2. Its charter of incorporation states that it was organized "for the purpose of establishing and maintaining a friendly intercourse among its members and assuring them a decent burial."

Members of the association were limited to members of The United House of Prayer for All People, otherwise known as the Church on the Rock of the Apostolic Faith. This

was a negro church professing the Christian religion. Its tenets were prescribed by and it was in all respects dominated by its Bishop, one Charles M. Grace. It had local churches in New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia.

The plaintiff had members in practically all of these churches in the States above named, but the membership in the various local churches had no separate organization nor officers. Dues were collected from them by the local church clerk. There was no provision for meetings of the members of the association located in the several local churches, but the bylaws did provide that—

> Once each year a sermon shall be preached to the Association. All members are required to be present and it shall contribute to the cause of Christ.

The association had no statement of principles, and no ritual was prescribed for any meeting that might be held. The activities of the association consisted alone in the collection of dues, the making of assessments, and the payment of funeral expenses of a deceased member. The Bishop of The United House of Prayer for All People was the president of the association, and he nominated the members of the board of directors, which was known as "The House of the Bishop." The association maintained no collectors nor salesmen. All collections were made by the local church secretaries and people were induced to join the association because of their friendship and respect and esteem for the Bishop, and in order to secure the benefits offered. Except for his prestige and influence, no members could have been secured. He, however, made no personal solicitation for members, nor did he collect the dues. For his services in securing members for the association and for otherwise managing and supervising the business affairs of the association he was paid 25 percent of its gross receipts.

3. The plaintiff filed no income tax returns for the years 1931, 1932, and 1934 until July 1935, and then as a result of a demand by the Collector of Internal Revenue. These returns show gross income for the years 1931, 1932, and 1934 of $7,898.02, $3,965.03 and $3,663.83, respectively, all of which,

except a small amount of interest, represented fees, dues, and assessments. From this gross income the plaintiff deducted in each of said years $3,860.30, $2,563.56 and $2,306.76, respectively. Of the amount deducted in 1931 $1,628.00 represented compensation of officers, and of the amount deducted in 1932 $837.00 represented compensation of officers, and of the amount deducted in 1934 $800.00 represented compensation of officers. The balance was for office expenses and burial benefits. The deductions claimed were allowed by the Commissioner. Subsequently, taxes, interest, and penalties for each of the years were paid as follows:

1931	$205.81
1932	295.13
1934	236.20

4. Subsequently, and within the time allowed by law, the plaintiff filed claims for refund on the ground that it "is a benevolent life insurance association and is exempt from taxation."

In due course the Commissioner disallowed the claims for this reason:

> Inasmuch as the organization operates over a number of states, it does not meet the requirements of the statute that it must be purely local in character. * * *

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The plaintiff sues to recover income taxes for the years 1931, 1932, and 1934 on the ground that it is exempt under the terms of section 103 of the Revenue Act of 1928 (45 Stat. 791), and the same section of the Revenue Act of 1932 (47 Stat. 169). These sections provide that the following organizations, among others, are exempt from taxation:

> (3) Fraternal beneficiary societies, orders, or associations, (A) operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system; and (B) providing for the payment of life, sick, accident, or other benefits to the members of such society, order, or association or their dependents;
>
> * * * * *

(10) Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per centum or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

The plaintiff is incorporated under the laws of the District of Columbia, providing for the incorporation of fraternal beneficial associations, "for the purpose of establishing and maintaining friendly intercourse among its members and assuring them a decent burial." It was organized and thereafter dominated by Charles M. Grace, who was the Bishop and supreme authority of a negro church known as "The United House of Prayer for All People," and also known as the "Church on the Rock of the Apostolic Faith." The members of the association were confined to members of this church, which had local churches in New York, Pennsylvania, Maryland, Virginia, North Carolina, South Carolina, and Georgia. It was run for the sole purpose of providing a decent burial for its members.

It is clearly not exempt under section 103 (10) of the revenue act for the reason, if none other, that it was not an association "of a purely local character," inasmuch as it had branches in most of the churches situated in the states above named.

If it is exempt at all, it is exempt as a fraternal beneficiary society under the provisions of section 103 (3). The first requisite for exemption under this subsection is that the society must operate "under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system." The second requisite is that it must provide for the payment of life, sick, accident, or other benefits to its members. The plaintiff complies with the second requisite.

One may comply with the first requisite in either one of two ways: either it must operate under the lodge system itself; or if it does not do so, it must be operated for the exclusive benefit of the members of a fraternity that operates under the lodge system.

The only testimony in the record as to whether or not this organization itself is a fraternal beneficiary society operating

under the lodge system is the following, elicited on cross-examination:

> X Q. Does the Family Aid, then, have branches of the church in all of these states?
> A. Yes, sir.
> X Q. Are they like chapters in a Masonic organization?
> A. Just about like that.
> X Q. A fraternal organization?
> A. Yes, ma'am. It is seemingly a part of the church, because the church clerks collect the money and forward it, without consideration, other than what the Bishop may give them out of his own pocket. I don't know whether he does or not.

There is no testimony to show the principles and purposes of the association, except that it was a burial association; nor is there testimony to show what sort of ritual was followed at the meetings, or that any ritual was followed at all. No statement of principles nor ritual is provided for in the constitution and bylaws. Nor do the constitution and bylaws provide for any meetings, except once a year for the purpose declared in section 2 of the bylaws, which reads:

> Once each year a sermon shall be preached to the Association. All members are required to be present and it shall contribute to the cause of Christ.

In the testimony no mention is made of any meetings, and we are convinced that none were ever held, unless it was the meeting above referred to. Indeed, no provision was made for a separate organization of the members in the various local churches. The testimony shows that the entire activities of the association were the collection of dues from the members, the making of assessments against them when a member died, and the payment of sums for funeral expenses upon the death of a member. Under such facts it cannot be said that the association is a fraternal beneficiary society operating under the lodge system.

The testimony does show, however, that only members of The United House of Prayer for All People could become members of the society; but the testimony shows that The United House of Prayer for All People is a religious, not a fraternal organization, a Christian church founded on the

Bible, and dominated by its Bishop. In answer to the question, "Is it a nondenominational organization, or interdenominational organization, or what is it?" one of the witnesses said, "It is his denomination" (meaning the Bishop's denomination).

One of the fundamental tenets of the Christian church is the brotherhood of man, and so it might be called a fraternal society, but we think it clear that Congress did not have in mind a church when it spoke of "a fraternity * * * operating under the lodge system." Churches are referred to in section 103 (6) of the Act as "religious" organizations. However much alike may be a fraternal organization and a Christian church, we are satisfied Congress did not have in mind a church or a religious organization when it spoke of a fraternity operating under the lodge system.

The reasons for the exemption of a burial association operated for the exclusive benefit of members of a church are just as potent as are those for the exemption of a burial association operated for the exclusive benefit of a fraternal society. But be that as it may, the fact remains that Congress did not exempt an association operated for the benefit of the members of a church, but only those operating for the benefit of the members of a fraternal association operated under the lodge system. It is well recognized that a statute granting exemption is strictly construed against the person claiming the exemption. *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *United States Trust Company* v. *Anderson*, 65 F. (2d) 575, and cases cited.

The defendant also insists that this organization is not exempt because the Bishop received 25 percent of its gross receipts. We do not think this position is well taken. This 25 percent was allowed by the Commissioner of Internal Revenue as a proper deduction from gross income as compensation of officers. It was a sum paid to the Bishop for his services to the organization. The value of these services cannot be minimized. One of the witnesses stated, "Well, the Bishop is a very influential man with his members, and I do not think we could get any members in the association without the Bishop." He, no doubt, did not solicit members directly, but members were secured primarily because of him. His services were essential to the continuance of the business

of the association. The sum paid him was not a division of the profits of the enterprise, but compensation for services rendered.

We hold that the plaintiff's petition must be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

MRS. LOUISE HARRIS MOORE (MRS. H. CLAY MOORE) v. THE UNITED STATES

[No. 44578. Decided March 3, 1941]

On the Proofs

Income tax; liability of wife under joint return filed by husband.—Where a wife, having no taxable income of her own for the year 1932 but on the contrary a considerable net loss, made no separate income-tax return; and where her husband made a joint return of the incomes and losses of both for said year, with no separation on the return of the items of income and loss as between himself and his wife; it is *held* that under the provisions of section 51 (b) of the Revenue Act of 1932 the wife is liable for the income tax originally assessed and for a deficiency assessed upon the aggregate taxable income of herself and her husband. *Helvering* v. *Janney*, 311 U. S. 189; *Taft* v. *Helvering*, 311 U. S. 195, cited.

Same.—The filing of a joint return by husband and wife creates a "joint taxable unit" at least to the extent that it is to the advantage of one of the spouses to create such a unit.

Same.—The wife cannot allow a joint return to be filed without becoming liable for the tax assessed thereunder.

Same.—Where the husband making a joint return for himself and wife, under section 51 (b) of the Revenue Act of 1932, fails to pay the assessed tax, the wife cannot still take advantage of the deductions allowable on the husband's income and assert there is no liability, or only a proportionate liability, upon her for said tax.

The Reporter's statement of the case:

Mr. J. C. Murphy for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar*, were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a citizen of the United States and a resident of Atlanta, Georgia.

2. June 15, 1933, pursuant to extensions duly granted, H. Clay Moore, husband of plaintiff, filed a joint income-tax return for himself and plaintiff for the calendar year 1932. The return was signed only by H. Clay Moore and showed a tax due of $2,291.49, which with interest of $19.09 was assessed on the June 1933 list. No separate return was filed by plaintiff for 1932.

3. The return referred to in finding 2 showed the following items of income:

Interest	$90.00
Rents	1,675.21
Profit on sale of stock	14,967.27
Dividends	8,115.75
Total	24,848.23

In addition the return showed a capital net gain of $13,-444.64, which included a gain on the sales of certain Coca-Cola stock in the amount of $21,762.36; a gain on the sale of 10 shares of American Telephone and Telegraph Company stock of $371.63 and a loss on the sale of 148 shares of American Telephone and Telegraph Company stock of $8,689.32, that is, a net loss on the sales of 158 shares of American Telephone and Telegraph Company stock of $8,317.69. All the sales of stock reported on the return were with respect to stock which had been held more than two years.

4. The only items of income or deductions included in the joint return referred to in findings 2 and 3 which belonged to plaintiff (such items being plaintiff's only items of income or deductions) were an amount of $247.50, which represented dividends received by plaintiff, and was included in the dividend item of $8,115.75 on the return; profit on the sale of 10 shares of American Telephone and Telegraph Company stock in the sum of $371.63 and a loss from the sale of 50 shares of American Telephone and Telegraph Company stock, which was included in the loss from the sale of 148 shares of that stock shown on the return in the

total amount of $8,689.32. No segregation of the items was made on the return as between H. Clay Moore and plaintiff.

5. As the result of an examination by an Internal Revenue agent, H. Clay Moore was advised on April 9, 1934, of a proposed deficiency of $1,072.35 and, after the signing by H. Clay Moore on April 12, 1934, of a waiver of restrictions on assessment and collection, the deficiency, together with interest of $74.10, was assessed on the April 1934 list.

6. June 2, 1934, the Commissioner of Internal Revenue sent H. Clay Moore, a sixty-day letter advising him of the determination and assessment of the deficiency referred to in finding 5 and of his right to petition the United States Board of Tax Appeals for a redetermination of the deficiency. In that determination the Commissioner reduced the net loss on the sale of 158 shares of American Telephone and Telegraph Company stock from $8,317.69, as shown in the return, to $6,195.07, but otherwise left unchanged the items on the return which were attributable to plaintiff. Other adjustments made by the Commissioner related to items attributable to H. Clay Moore. All capital net gain was treated by the Commissioner as ordinary net income in lieu of a segregation as shown in the joint return, with an explanation that the former treatment appeared to be to the advantage of the taxpayer.

7. October 13, 1934, the Commissioner mailed to plaintiff a ninety-day letter advising her of the determination and proposed assessment against her of a deficiency in income tax of $3,363.84, that is, in the total amount of the original tax ($2,291.49) and deficiency ($1,072.35), which had been previously assessed against H. Clay Moore. The assessment was based upon the same items of income and deductions as were shown in the Commissioner's deficiency letter of June 2, 1934, to H. Clay Moore.

8. December 4, 1934, plaintiff paid the deficiency asserted against her in the amount of $3,363.84, with interest of $373.68, making a total of $3,737.52. No part of the original tax shown due on the return, or of the deficiency, was ever paid by H. Clay Moore, and the assessment against him of the original tax and interest and also the deficiency and interest were abated February 12, 1935.

9. November 18, 1936, plaintiff filed a claim for refund of the tax and interest paid as shown in finding 8, which, after setting out various statements as to the filing of the joint return and the collection of the tax, including the statement that the tax was collected from her because of the inability of H. Clay Moore to make payment, assigned as grounds for refund that the tax liability should have been apportioned between H. Clay Moore and plaintiff in accordance with the income of the two parties, that the profit on the sale of certain stock was not taxable and that a loss of $45,861.50 sustained on the sale of Coca Cola common stock held less than two years should have been allowed as a deduction in computing income subject to tax.

10. During 1932 H. Clay Moore sustained a loss of $45,861.50 from the sale of Coca Cola stock which had been held less than two years. No sales, other than the foregoing, were made by him or plaintiff in 1932 of stock held less than two years. No deduction was claimed by H. Clay Moore on the joint return for the foregoing loss, nor has any allowance been made therefor by the Commissioner.

11. June 4, 1937, the Commissioner rejected the claim for refund referred to in finding 9.

The court decided that the plaintiffs were not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff in the year 1932 received $247.50 from dividends and had a net loss of some thousands of dollars on the sale of 60 shares of American Telephone and Telegraph Company stock. On June 15, 1933, pursuant to extensions duly granted, plaintiff's husband filed a joint return for himself and plaintiff which listed a dividend item of $8,115.75, which included plaintiff's dividends of $247.50; listed a net loss of $8,317.69 on the sale of 158 shares of American Telephone and Telegraph Company stock, which included the loss on plaintiff's sale of 60 shares of such stock; listed a total capital net gain of $13,444.64 resulting from a gain of $21,762.36 on the sales of certain shares of Coca Cola stock by the husband, and the loss of $8,317.69 recited above; and listed

other items of income which in fact arose out of the husband's transactions, showing a total ordinary net income of $24,848.23, and a capital net gain of $13,444.64, making a total tax due of $2,291.49, which with interest of $19.09 was assessed to the husband on the June 1933 list. The return filed by plaintiff's husband, and signed only by him, nowhere specified any particular item of income or loss as attributable to the individual transactions of either plaintiff or her husband. Plaintiff did not file a separate return for 1932.

In June 1934, after proper preliminary steps, the Commissioner of Internal Revenue advised plaintiff's husband of the assessment of a deficiency of $1,072.35, a part of which was due to the reduction by the Commissioner of the net loss on the sale of the American Telegraph and Telephone Company stock from $8,317.69, as claimed on the return, to $6,195.07. The balance of the assessed deficiency was attributable solely to the affairs of plaintiff's husband.

Plaintiff's husband paid no part of the assessed tax or deficiency, and on October 13, 1934, the Commissioner advised plaintiff of the determination and proposed assessment against her of a deficiency in income tax of $3,363.84 consisting of the $2,291.49 of original tax and the $1,072.35 of deficiency which had been previously assessed against her husband. On December 4, 1934, plaintiff paid the deficiency assessed against her, with interest of $373.68, making a total of $3,737.52. On February 12, 1935, the assessment against plaintiff's husband was abated, apparently because the tax had been paid by plaintiff.

On November 18, 1936, plaintiff filed a claim for refund of the amount she had paid, asserting that the tax liability should have been apportioned between herself and her husband in accordance with their respective incomes, and that certain profits taxed were not taxable, and certain losses not claimed by plaintiff's husband on the joint return were allowable as deductions. On June 4, 1937, the Commissioner rejected the plaintiff's claim for refund, and on January 5, 1939, plaintiff bought this suit.

The question involved is whether, under the Revenue Act of 1932, a wife, having no taxable income of her own but

a considerable net loss, is liable for the income tax originally assessed and for a deficiency assessed upon the aggregate taxable income of herself and her husband, she having made no separate income-tax return, and her husband having made a joint return of the incomes and losses of both, with no separation of the items of income and loss as between himself and his wife shown on the return. The further ground apparently asserted in plaintiff's claim for refund of November 18, 1936, that, admitting plaintiff's liability for the tax, the amount of the tax was excessive because of gains improperly taxed and allowable losses not claimed on the return, seems not to be included in the petition, was not urged in plaintiff's brief or argument and is not considered herein.

The immediately applicable portion of the Revenue Act of 1932, 47 Stat. 169, 188, is as follows:

Sec. 51. Individual returns.

(a) Requirement.—The following individuals shall each make under oath a return stating specifically the items of his gross income and the deductions and credits allowed under this title—

(1) Every individual having a net income for the taxable year of $1,000 or over, if single, or if married and not living with husband or wife;

(2) Every individual having a net income for the taxable year of $2,500 or over, if married and living with husband or wife; and

(3) Every individual having a gross income for the taxable year of $5,000 or over, regardless of the amount of his net income.

(b) Husband and wife.—If a husband and wife living together have an aggregate net income for the taxable year of $2,500 or over, or an aggregate gross income for such year of $5,000 or over—

(1) Each shall make such a return, or

(2) The income of each shall be included in a single joint return, in which case the tax shall be computed on the aggregate income.

Article 381 of Treasury Regulations 77, promulgated under the Revenue Act of 1932, and relating to section 51, sheds no new light on the question here involved.

Substantially the same provisions as those of Section 51 (b) have been in the earlier revenue acts as far back as

the Revenue Act of 1918, 40 Stat. 1057, 1074. The question of this case, and cognate questions have been considered by the Department and litigated in the Board of Tax Appeals and the courts.

The Supreme Court of the United States has made two recent relevant decisions under the Revenue Act of 1934, which Act contains language identical with Section 51 (b) of the 1932 Act. One decision was to the effect that where one of the spouses, as to whom a joint return had been made, had net gains from the sale of capital assets and the other had net losses, the losses would be set off against the gains to determine whether there was a net income, and if so, the amount of it. *Helvering* v. *Janney*, 311 U. S. 189, 61 S. Ct. 241 (decided December 9, 1940). The other decision was to the effect that where one of the spouses, as to whom a joint return had been made, had made charitable contributions in excess of 15% of her net income, while the other's contributions were less than 15% of his net income, the combined charitable contributions of both, up to 15% of the combined net income of both, could be deducted in computing the taxable income. *Taft* v. *Helvering*, 311 U. S. 195, 61 S. Ct. 244 (decided December 9, 1940). In the latter case the court said:

> The principle that the joint return is to be treated as the return of a "taxable unit" and as though it were made by a "single individual" would be violated if in making a joint return each spouse were compelled to calculate his or her charitable contributions as if he or she were making a separate return. The principle of a joint return permitted aggregation of income and deductions and thus overrode the limitations incident to separate returns.

These decisions make clear that the filing of a joint return creates a joint "taxable unit" at least to the extent that it is to the advantage of one of the spouses to create such a unit.

Such a joint return cannot be effectively made against the will of either spouse. The statute requires either a return by each, or a joint return, and, of course, if a wife

made a separate return, as she would have a right to do, her husband's attempt to make a joint return, in order to take advantage of deductions she might be entitled to, would not be permitted. Can she then allow a joint return to be filed, without becoming liable for the tax? We think not.

A conclusion that she is not liable for the tax, or is only pro rata liable, would give rise to a number of problems. Since 1918, when the statutes first provided for joint returns by husband and wife, provision has never been made in the form of return for a separation of the items of income and deductions attributable to each. If plaintiff's contention is correct, a large proportion of the assessments made upon joint returns since that time have been inaccurate, and indeed it would have been impossible for the taxing officials to make a proper assessment against each on the basis of information secured from the return. It follows that in such cases the Government has never known from whom the tax is due, or how much was due from each, if each had a net income.

It is apparently assumed in plaintiff's argument that one of the spouses can still take advantage of the deductions allowable on the other's income, although the one making the return fails to pay the tax and the other asserts that there is no liability, or only a proportionate liability upon her.

The following language of Judge Patterson, dissenting in the case of *Commissioner of Internal Revenue* v. *Rabenold*, (C. C. A. 2), 108 Fed. (2d) 639, 641, points out further difficulties:

> The decision also introduces difficulties in enforcement of the tax. Take a case where husband and wife file a single return showing a tax due of $5,000, but no tax is paid. Must the government in such a case take on the task of discovering the separate income of each spouse and of pursuing each for his or her portion of the tax? Or take the case, a common one, where a joint return is filed and the tax shown due thereon is paid, but the commissioner later finds a deficiency. Must the commissioner not merely analyze all the fig-

ures and determine what part of the total tax was originally owed by each, but also find out, if he can, the contributions of each to the prior payments made on account of the tax and credit each accordingly? Such complexities in tax gathering "are not lightly to be imputed to legislators." *Edwards* v. *Slocum*, 264 U. S. 61, 63, 44 S. Ct. 293, 68 L. Ed. 564.

Judge Patterson further points out that Congress, in the Revenue Act of 1926, Section 240, 44 Stat. 46, expressly provided for single consolidated returns by affiliated corporations, with assessment of the tax to each on the basis of the net income properly assignable to each, thus indicating that if such a result had been intended in the case of a joint return by husband and wife, a comparable provision would have been made by Congress.

In the 1938 and later acts Section 51 (b) was clarified to expressly provide that where a joint return is filed, a husband and wife are jointly and severally liable for the tax liability for that year (52 Stat. 447). In the House Report on this Act the change is explained as follows (H. Rep. No. 1860, 75th Cong., 3d Sess., pp. 29–30; 1939–1 Cum. Bull., Part 2, 749):

> Section 51 (b) of the bill expressly provides that the spouses, who exercise the privilege of filing a joint return, are jointly and severally liable for the tax computed upon their aggregate income. It is necessary, for administrative reasons, that any doubt as to the existence of such liability should be set at rest, if the privilege of filing such joint returns is continued.

This statement by the Committee is nothing more than a recognition of the obvious fact that because of certain court decisions hereinafter cited, it was necessary that the meaning of the statute be made plain beyond argument, in order that it might be properly administered. It would not be a wise process of construction to treat the action of a legislature in clarifying a statute as an acquiescence in the contention that the statute had a different meaning before the clarifying change was made.

We conclude that the tendency to construe taxing statutes in favor of the taxpayer is not sufficiently strong to re-

quire the construction contended for by the plaintiff, with all the difficulties of administration and fair application which that construction would involve. We think that the natural meaning of the word "joint," in its context, is that both spouses should be liable for the resulting tax.

We reach this conclusion with reluctance, because of the contrary decisions by several of the United States Circuit Courts of Appeals. *Cole* v. *Commissioner* (C. C. A. 9), 81 Fed. (2d) 485; *Crowe* v. *Commissioner* (C. C. A. 7), 86 Fed. (2d) 796; *Commissioner* v. *Rabenold*, *supra; Sachs* v. *Commissioner* (C. C. A. 6), 111 Fed. (2d) 648. However, we find the dissenting opinions of Judge Wilbur in the *Cole* case, *supra*, and Judge Patterson in the *Rabenold* case, *supra*, more persuasive, particularly in view of the language of the Supreme Court in the *Janney* and *Taft* cases, *supra*. See also *Anderson* v. *United States* (C. C. A. 5), 48 Fed. (2d) 201.

Plaintiff's petition is accordingly dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

CHARLES J. BROWN, DR. M. JACOB, AND JAMES A. GLEASON, EXECUTORS OF THE ESTATE OF PRYOR BROWN, DECEASED, v. THE UNITED STATES

[No. 44727. Decided March 3, 1941]

On the Proofs

Estate tax; deductions disallowed by Commissioner.—Where the Commissioner of Internal Revenue included in decedent's gross estate a proportionate amount of the sum shown to be owing to decedent by a corporation in which decedent was owner of one-half of the stock, said proportionate amount being calculated on the balance sheet of said corporation introduced in evidence and not contested; it is *held* that the valuation placed on said account by the Commissioner was not excessive and plaintiffs are not entitled to recover.

Same.—Where the Commissioner of Internal Revenue disallowed as a deduction the amount of $3,500 paid by decedent's executors in settlement of decedent's liability on a note of $6,000 signed by decedent as surety for another, it is *held* that such deduction was allowable and plaintiffs are entitled to recover.

Same; installment note.—Where the Commissioner disallowed the sum of $750, being the balance due on a note for $1,000 executed by decedent to a hospital building fund association, payable in optional installments and contingent upon the raising of a given amount for said hospital fund, and where decedent on demand did not pay the note in full and instead paid certain installments in accordance with the optional terms of the note; it is *held* that at the date of decedent's death said note being nonnegotiable and in the hands of the original payee was an installment note and not a demand note.

Same; statute of limitation.—Where all the installments due on a note executed by decedent had matured more than six years prior to decedent's death except the installments maturing on October 15, 1930; April 15, 1931; and October 15, 1931; it is *held* that the statute of limitation began to run as soon as a right of action accrued and plaintiffs are entitled to a deduction for only those installments which matured within the six years prescribed by the laws of Tennessee as the period of limitation.

Same; pledges to charitable institutions.—Pledges to charitable institutions made for no other consideration than the promotion of the work of these institutions are not deductible as claims against the estate because not contracted "for an adequate and full consideration in money or money's worth" (*Taft* v. *Commissioner*, 92 Fed. (2d) 667) but pledges made contingent upon sums being contributed by others to the same institution are deductible, because in such case there is a money consideration; to wit, the money contributed by others. *Porter* v. *Commissioner of Internal Revenue*, 60 Fed. (2d) 673, 675.

The Reporter's statement of the case:

Mr. D. F. Prince for the plaintiff. *Mr. Geo. E. H. Goodner* and *Miss Helen Goodner* were on the briefs.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiffs are the duly appointed, qualified, and acting executors of the estate of Pryor Brown, who died a resident of Knoxville, Tennessee, on August 12, 1936.

As such executors they duly filed an estate tax return with the Collector of Internal Revenue for the District of Tennessee disclosing a gross estate of $147,984.58, a net estate of $73,913.21 before deducting the exemptions allowed by law, with a consequent tax liability of $1,513.06, which was paid on November 15, 1937.

On an audit of this return the Commissioner determined a gross estate of $176,042.58, and total deductions of $69,871.62, as a result of which he determined and assessed a deficiency in tax of $3,378.09, which was paid by the plaintiffs on October 28, 1937.

Subsequently, and within the time allowed by law, plaintiffs filed claims for refund alleging: (1) that the Commissioner had erroneously included in the gross estate the amount of $11,058 as the value of an account due decedent from the Pryor Brown Transfer Company; (2) that he had erroneously disallowed as a deduction the amount of $3,500 paid by the executors in settlement of decedent's liability on a note of $6,000 signed by him as surety for one Blankenship; and (3) that he erroneously disallowed a deduction of $750, being the balance due on a note of $1,000 executed by the decedent to St. Mary's Hospital Building Fund Association on December 21, 1927.

2. Among the assets of decedent's estate at the time of his death was an account due him of $55,408.14 by the Pryor Brown Transfer Company. The executors believed this account to be worthless and so reported it in their report to the Probate Court, and in their Tennessee State Inheritance Tax Return, and in their Federal Estate Tax Return, and no part of this debt had been collected up until February 8, 1940, the time of the hearing of this case before a commissioner of this court.

The Pryor Brown Transfer Company was a corporation, one-half of the stock in which was owned by the decedent at the time of his death, and the other half by his son, Charles

J. Brown. Its balance sheet as of July 31, 1936, is as follows:

ASSETS

Current Assets:			
Cash on Hand	$250.00		
Cash in Bank	47.18	$297.18	
Accounts Receivable		11,528.93	
Notes Receivable		160.00	
Cash in Savings Account for retirement of Notes Payable—Bank		107.20	
Total Current Assets			$12,093.31
Other Assets:			
Claim—Trustees East Tennessee National Bank		$65.46	
Brown Cab Company—Equipment Rental		15,975.00	16,040.46
Fixed Assets:			
Cab Equipment	$50,177.77		
Mail Truck Equipment	10,203.80		
Other Car Equipment	2,900.00		
Furniture and Fixtures	3,125.76		
Shop Equipment	518.27	$66,925.60	
Less: Reserve for Depreciation		66,679.32	
Fixed Assets—Net			$246.28
Intangible Assets—Good Will			10,000.00
Deferred Assets—Prepaid Insurance			936.80
Total			$39,316.85

LIABILITIES AND NET WORTH

Current Liabilities:			
Notes Payable — Mrs. Pryor Brown	$939.79		
Notes Payable—Bank of Knoxville	1,000.00	$1,939.79	
Accounts Payable—Pryor Brown	55,408.14		
Accounts Payable—C. J. Brown	1,316.34	56,724.48	
Old Checks Outstanding		19.00	
Brown Cab Company		4,687.55	
Accrued Taxes		38,000.00	
Total Current Assets [Liabilities]			$101,370.82
Net Worth:			
Capital		$10,000.00	
Surplus (Deficit)		(72,053.97)	
Total Net Worth			(62,053.97)
Total			$39,316.85

No proof was introduced to show whether or not the figures on the balance sheet reflected the true value of the assets, except as to the account of $15,975 against the Brown Cab Company. To support the valuation of this account the balance sheet of the Brown Cab Company was introduced, which shows a net worth of that company of $2,785.18, at which value this stock was reported by the executors, the decedent owning all of the capital stock of this company. We find as a fact that this account did have the value at which it was carried on the balance sheet of the Pryor Brown Transfer Company, to-wit, $15,975, and that the other assets had a value of not less than the amount at which they were carried on the balance sheet, and that the liabilities were as shown thereon.

3. The building in which the Pryor Brown Transfer Company operated was owned by the decedent, and was leased by him to the said company, the lessee agreeing to pay the taxes. On August 31, 1936, $38,000 of taxes were unpaid. The executors negotiated a loan of $80,000 on the building to pay taxes against the estate, out of which the $38,000 was paid.

4. After decedent's death suit was brought on the aforementioned note of $6,000, and judgment was rendered against decedent's estate. Under a compromise arrangement the plaintiffs paid $3,500 in settlement and satisfaction of this judgment. Blankenship, the principal on the note, was and is wholly insolvent.

5. On December 21, 1927, the decedent executed his note to St. Mary's Hospital Building Fund Association, which reads as follows:

> $1000.00 KNOXVILLE, TENN., *12–21, 1927.*
>
> The undersigned hereby promises to pay to St. Mary's Hospital Building Fund Association the sum of One Thousand and no/100 Dollars, ($----------) to be paid to the Rev. L. J. Kemphues, Treasurer, as follows:
>
> One-sixth / One-eighth of said amount on April 15, 1928, and
>
> One-sixth / One-eighth } of said amount on the 15th day of each October and April thereafter, until the full amount is paid.

This agreement is made for the purpose of financing the building of St. Mary's Hospital, an institution to be erected in the City of Knoxville, Tennessee, and in further consideration that the full amount of One Hundred Thousand Dollars ($100,000.00), shall be subscribed by good and solvent parties for the erection of said hospital.

PRYOR BROWN.

Advise us 10 days before entire pledged amount is wanted.

The total amount subscribed to this association was $104,000. Decedent had made two payments on said note of $125.00 each, one in November 1928, and the other one in November 1929. There was a balance due and unpaid at the time of his death of $750.00.

The court decided that the plaintiffs were entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This suit is brought to recover estate taxes alleged to have been erroneously exacted from the plaintiffs as the executors of the estate of Pryor Brown, deceased. The grounds alleged here and in the claims for refund are: (1) that the Commissioner of Internal Revenue erroneously included in the gross estate of the decedent the amount of $11,058 as the value of an account due the estate from the Pryor Brown Transfer Company; (2) that he erroneously disallowed a deduction of $3,500, being the amount paid in settlement of a judgment against the estate on a note of $6,000 signed by the decedent as surety for one John W. Blankenship; and (3) that he erroneously disallowed the sum of $750, being the balance due on a note for $1,000 executed by the decedent to the St. Mary's Hospital Building Fund Association.

There are but two issues to be decided, since the defendant admits that the estate is entitled to the deduction of $3,500 paid in settlement of decedent's liability on the Blankenship note, with which we agree.

1. We think the Commissioner properly included in the decedent's estate the sum of $11,058 as the value of decedent's account against the Pryor Brown Transfer Company. The plaintiffs contend that this account was worthless and

they so reported it to the Probate Court, and on their State Inheritance Tax Return, and on their Federal Estate Tax Return, and they so testified on the hearing of this case. The defendant, however, introduced the balance sheet of the Pryor Brown Transfer Company as of a date just a few days prior to decedent's death. This balance sheet shows that the company had total assets of $29,316.85, exclusive of good will, which was carried at $10,000. Against these were liabilities of $101,370.82, all of which, except $1,939.79, were due the decedent or the Brown Cab Company, all the stock of which the decedent owned, or C. J. Brown, decedent's son and one-half owner of the Pryor Brown Transfer Company. (See last paragraph of finding 2.)

If the figures on the balance sheet reflect the true value of the assets and liabilities, and if these values could have been realized on liquidation, the creditors would have received on liquidation approximately 29 percent of their claims. The balance sheet was introduced by the defendant. No testimony was offered in support of it; but, on the other hand, no testimony was offered by the plaintiffs to show that it did not reflect the true condition of the business. Since these facts were peculiarly within the knowledge of the plaintiffs, the burden was upon them to show this if they could. Having failed to do so, we must assume that it does correctly reflect the condition of the business.

It shows that this company was indebted to decedent in the amount of $93,408.14, including the $38,000 of accrued taxes. Twenty-nine percent of this amount is $27,088.36. The Commissioner has valued the account at $11,058. It would, therefore, appear that his valuation was not excessive; at least, the plaintiffs have not shown that the Commissioner's valuation was excessive, and the burden was upon them to do this.

2. On the question of the plaintiffs' right to a deduction of the balance due on the note of $1,000 executed to St. Mary's Hospital Building Fund Association, the defendant contends, first, that this was a demand note and was barred by the six-year statute of limitations of Tennessee (sec. 8600, Code of Tennessee, 1932); and, second, if incorrect in this,

that, at any rate, $375 of it is barred, even if it be treated as an installment note, because so much of the amount due had matured more than six years prior to decedent's death.

The defendant evidently believed that the obligation evidenced by the note was a valid, enforceable obligation under the laws of Tennessee, and that it was contracted "for an adequate and full consideration in money or money's worth," because these points are not raised.

It does seem to be a valid, enforceable obligation under the laws of Tennessee. See *Third Presbyterian Church* v. *Caldwell*, 4 Higgins (Tenn.) 30. Whether or not it was an obligation contracted for an "adequate and full consideration in money or money's worth" is a more difficult question.

It appears, however, that the note was executed "in further consideration that the full amount of One Hundred Thousand Dollars ($100,000.00) shall be subscribed by good and solvent parties for the erection of said hospital"; and it appears that more than the amount of $100,000 was subscribed therefor. In a similar case, the Sixth Circuit Court of Appeals in *Taft* v. *Commissioner of Internal Revenue*, 92 F. (2d) 667, held that pledges to charitable institutions made for no other consideration than the promotion of the work of these institutions were not deductible as claims against the estate because not contracted "for an adequate and full consideration in money or money's worth." (It recognized, however, that a number of the other circuits had held to the contrary. *Turner* v. *Commissioner*, (C. C. A. 3) 85 F. (2d) 919; *Commissioner* v. *Bryn Mawr Trust Co.*, (C. C. A. 3) 87 F. (2d) 607, 609; *United States* v. *Mitchell*, (C. C. A. 7) 74 F. (2d) 571; *In re Atkins' Estate*, (C. C. A. 5) 30 F. (2d) 761, 764.) But, on the other hand, it held that pledges made contingent upon sums being contributed to the same institution by others are deductible, because in such case there is a money consideration; to wit, the money contributed by others, citing, among other cases, *Porter* v. *Commissioner of Internal Revenue* (C. C. A. 2) 60 F. (2d) 673, 675.

The *Taft* case was followed by the Fourth Circuit in the case of *Helvering* v. *Safe Deposit & Trust Company of Baltimore*, 95 F. (2d) 806.

We are content to follow these decisions. While no pecuniary consideration passed to the promisor, nevertheless, his promise induced others to promise to pay money, and their promises to pay money induced his promise. In such case we think it can be said fairly that there was a money consideration. It is, of course, well settled that the consideration for a promise need not be a consideration passing to the promisor, but may be for the benefit of another, and the consideration may be to induce another to part with some right or property. See *Emerson* v. *Slater*, 22 Howard 28; *Williams* v. *First National Bank of Pauls Valley*, 216 U. S. 582.

On the question of the statute of limitations, if the note in question was a demand note, it was barred at the time of decedent's death. The statute begins to run at the time the right to make the demand accrues. Section 8604, Code of Tennessee, 1932. Whether or not it was a demand note is not easy to determine. The printed form of the note provided for the payment of one-sixth or one-eighth of it on April 15, 1928, and one-sixth or one-eighth of it on the 15th day of each October and April thereafter until the amount was fully paid. The promisor was supposed to strike one provision or the other, depending on whether he wanted to pay it in six or eight installments, but neither provision was stricken, and underneath the signature of the payor he wrote "Advise us 10 days before entire pledged amount is wanted." Does this mean that he intended to disregard the printed portion of the note for the payment of it in installments, and intended to pay it all ten days after demand? This question can best be answered by what the parties did. He did not pay it all on demand, but paid two installments, each in the amount of one-eighth of the principal. If this was not in accord with his promise in the beginning, the agreement was at least so amended by mutual consent. We hold, accordingly, that at the date of his death the note, being nonnegotiable and, anyway, being in the hands of the original payee, was payable in installments of one-eighth of the principal amount.

But the defendant says that all of the installments had matured more than six years prior to decedent's death,

except those maturing on October 15, 1930, April 15, 1931, and October 15, 1931, and that, therefore, only $375 of the obligation was legally enforceable at the time of decedent's death. The plaintiffs reply that the statute of limitations is a statute enacted for the benefit of the debtor and that he can plead it or not at his option. This is true. But there was a definite and inescapable obligation on the part of the executors of decedent's estate to plead the statute. If the statute had been pleaded, only those installments which matured within six years of decedent's death could have been enforced.

The plaintiffs say further that an action of debt could not have been maintained until all the installments had fallen due, citing the case of *Blackmore* v. *Wood*, 3 Sneed (Tenn.) 470, and that, since the last installment matured within the statutory period, the entire note can be collected. However, in the case cited the court recognized that an action of assumpsit might have been brought for the installments as they severally became due. Whatever the form of action, the statute of limitations began to run as soon as a right of action accrued. We, therefore, hold that the plaintiffs are entitled to a deduction for only those installments which matured within six years before decedent's death. See *City of Knoxville* v. *Gervin*, 169 Tenn. 532, 89 S. W. (2d) 348; *Morristown* v. *Davis, et al.*, 172 Tenn. 159, 110 S. W. (2d) 337.

Entry of judgment will be deferred until the filing of a stipulation by the parties, or, in the absence of such stipulation, until the incoming of a report of a commissioner, showing the amount due in accordance with this opinion. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

In accordance with a stipulation filed May 6, 1941, judgment for the plaintiffs was entered June 2, 1941, in the sum of $434.00 with interest thereon from November 15, 1937, according to law.

J. ALLEN SMITH & COMPANY, INC., v. THE UNITED STATES

[No. 44780. Decided March 3, 1941]

On the Proofs

Income tax; dividends declared prior to effective date of National Industrial Recovery Act.—Dividends declared by a corporation on July 19, 1932, and distributed on June 30, 1933, were not taxable under section 213 (a) of the National Industrial Recovery Act of June 16, 1933, which provided that "the tax imposed by this section shall not apply to dividends *declared* before the date of the enactment of this act."

The Reporter's statement of the case:

Mr. Geo. E. H. Goodner for the plaintiff. *Mr. D. F. Prince* and *Miss Helen Goodner* were on the brief.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation engaged in the milling business at Knoxville, Tennessee.

2. July 19, 1932, plaintiff declared a dividend not to exceed 25 percent of its capital stock, to be paid during the fiscal year ended June 30, 1933. Pursuant to that declaration plaintiff paid dividends in the amount of $40,000 on June 30, 1933.

3. The National Industrial Recovery Act became effective June 16, 1933. August 15, 1933, plaintiff filed a return on the form provided by the Commissioner of Internal Revenue and disclosed thereon the dividends referred to in Finding 2 as having been paid June 30, 1933.

4. In 1937 the Commissioner determined that plaintiff was liable for a tax on the dividends paid by plaintiff on June 30, 1933, in the sum of $2,000 (5 percent of $40,000), and he assessed that amount against plaintiff August 13, 1937, together with interest in the sum of $734.32, a total

of $2,734.32. August 23, 1937, plaintiff paid the assessment on demand of the collector.

5. In arriving at the interest so assessed and collected, the Commissioner computed it on $2,000 at the rate of 12 percent per annum from July 31, 1933, to August 30, 1935, and at the rate of 6 percent per annum from August 30, 1935, to August 17, 1937.

6. August 25, 1938, plaintiff filed a claim for refund of the tax and interest so paid in the amount of $2,734.32. The grounds of that claim were that (a) the National Industrial Recovery Act and/or section 213 thereof was unconstitutional; (b) the assessment and collection were erroneous because the dividend declaration was made prior to the effective date of section 213; (c) the assessment on dividends received by stockholders is double taxation on income and is therefore invalid and lacks the uniformity provided by the Constitution; (d) the tax and interest were assessed more than four years after the return was due and collection thereof was barred by the statute of limitations; (e) and in any event $225 of the interest is refundable under section 821 of the Revenue Act of 1938, such amount being the interest assessed and collected in excess of 6 percent per annum for the period October 24, 1933, to August 30, 1935.

7. More than six months had elapsed after the filing of the claim for refund without formal action having been taken thereon by the Commissioner and before this action was instituted. No part of the tax and interest sought to be recovered in this action has been refunded to plaintiff.

8. Plaintiff has borne the burden of the tax in suit in that it did not withhold it from the dividends paid to the stockholders, nor has it been otherwise reimbursed therefor.

9. January 13, 1939, a duly authorized representative of the Commissioner wrote plaintiff a letter in regard to the claim for refund in which he discussed the various points raised in the claim, and in communications from plaintiff asked for certain additional information, and in that letter made the following statement:

> The assessment made against you for June 1933 was not barred by the statute of limitations but inasmuch as the dividends on which the tax was paid are now

shown to have been validly declared on July 19, 1932, prior to the enactment of the National Industrial Recovery Act, the $2,000.00, plus interest, represents an overpayment as explained in the letter of November 25, 1938.

Further correspondence was had between the Commissioner and the plaintiff in regard to the claim, but the claim has not been allowed.

The court decided that the plaintiff was entitled to recover.

OPINION *per curiam:*

Plaintiff is a corporation. On July 19, 1932, it declared a dividend of not to exceed 25 percent of its capital stock to be paid during the fiscal year ending June 30, 1933. Pursuant to this declaration, plaintiff paid dividends in the sum of $40,000 on June 30, 1933.

In 1937 the Commissioner of Internal Revenue, purporting to act under Section 213 (a) of the National Industrial Recovery Act, assessed a tax of 5 percent, or $2,000, on the amount of dividends so declared together with interest in the sum of $734.32. The total sum of $2,734.32 was paid by the plaintiff on August 23, 1937.

Section 213 (a) of the National Industrial Recovery Act, 48 Stat. 195, 206, provides:

> SEC. 213. (a) There is hereby imposed upon the receipt of dividends (required to be included in the gross income of the recipient under the provisions of the Revenue Act of 1932) by any person other than a domestic corporation, an excise tax equal to 5 per centum of the amount thereof, such tax to be deducted and withheld from such dividends by the payor corporation. *The tax imposed by this section shall not apply to dividends declared before the date of the enactment of this Act.* [Italics inserted.]

The findings of fact show that the dividends so taxed were declared on July 19, 1932, and distributed on June 30, 1933. The National Industrial Recovery Act became effective on June 16, 1933, and consequently the dividends in question are exempt from tax under the last sentence of

Section 213 (a) as set out above. This is practically conceded in the brief filed for the defendant.

Judgment will accordingly be rendered in favor of the plaintiff for $2,734.32 with interest as provided by law. It is so ordered.

JOHN F. MOONEY, Jr., v. THE UNITED STATES

[No. 44946. Decided March 3, 1941]

On the Proofs

Pay and allowances; rental allowance for dependent mother.—It is *held* that the evidence adduced shows that the plaintiff, an Ensign in the Navy, was entitled to rental allowance for dependent mother.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in part as follows:

1. Plaintiff is a citizen of the United States, and upon his graduation from the United States Naval Academy on June 6, 1935, he became an Ensign. Plaintiff served in the Navy in such rank until May 30, 1937, upon which date he was dropped from active duty on account of defective vision.

* * * * *

5. During the period of this suit plaintiff contributed the sum of $50.00 regularly each month by allotment to the support of his mother. Aside from this contribution from plaintiff the mother had no other source of income except from odd sewing jobs, which amounted to less than $100 a year.

6. During the period from June 6, 1935, to May 30, 1937, the plaintiff was the chief support of his mother who was dependent upon him and was entitled to a rental allowance of $941.33.

The court decided that the plaintiff was entitled to recover.

Opinion *per curiam:*

During the period involved, plaintiff was an Ensign in the Navy, and he now sues to recover the statutory allow-

ance for a dependent mother during the period of his active service.

The findings show that during the period of this claim plaintiff's mother was dependent upon him for her chief support and that he contributed more than one-half of the amount required for reasonable living expenses. Consequently he would be entitled to recover a rental allowance as an officer with a dependent mother for the period from June 6, 1935, to May 30, 1937, in the amount of $941.33. Judgment will be rendered in favor of the plaintiff for that amount.

EDWARD WHITE RAWLINS v. THE UNITED STATES

[No. 44995. Decided March 3, 1941]

On the Proofs

Pay and allowances; rental and subsistence allowance of Navy officer separated from wife.—Where plaintiff, an officer in the United States Navy, married, with no children, was separated from his wife by reason of her refusal to live with him and not by any action of his own; it is *held* that plaintiff was entitled to rental and subsistence allowances of an officer of his grade and rank until his marriage was terminated by divorce.

Same.—Under the statute providing for rental and subsistence allowance to officers with dependents, a lawful wife or unmarried minor child is a statutory dependent, with no questions asked as to the fact of dependency. *Robey* v. *United States*, 71 C. Cls. 561 distinguished.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. E. Leo Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Miss Stella Akin* was on the brief.

The court made special findings of fact as follows:

1. Edward White Rawlins, plaintiff, was commissioned as an ensign in the United States Navy from June 5, 1924; commissioned lieutenant, junior grade, from June 5, 1927;

promoted to lieutenant, from June 30, 1932; and commissioned lieutenant commander from February 1, 1939, under which appointment he is now serving on active duty.

2. On March 13, 1933, plaintiff was married. No children have been born of the marriage. He and his wife lived amicably together until August 2, 1936. On that date, while he was a guest at the home of his wife's parents on Long Island, N. Y., his wife informed him that she did not desire to continue as his wife, and asked him to agree to her obtaining a divorce. Plaintiff was surprised by this declaration of his wife. He told her that he had supposed that their marriage had every prospect of being successful and permanent, and that, under the circumstances, he did not favor her plans for a divorce. However, in view of his wife's attitude and the impossibility of remaining as a guest at the home of her parents, he returned to New York City, where he was then stationed, leaving his wife with her parents.

3. After establishing himself in New York City, he communicated with his wife, hoping to settle their difference and resume their marital life together. This proposal his wife declined. She would not meet him unless he first agreed to give her a divorce.

4. In October 1936, his wife's father purchased an estate near Charlottesville, Va., and plaintiff's wife went there with her parents to live. She remained there for about a year, during which time she did not communicate with plaintiff except for occasional letters in which she sought his acquiescence in her efforts to obtain a divorce, which plaintiff declined to give.

5. Plaintiff's wife left Charlottesville, Va., late in 1937 and moved to Florida, where, after completing the three months' residence requirement, she filed suit for divorce in the Circuit Court for Dade County, Miami, Florida, on the ground of extreme cruelty.

The plaintiff obtained leave of absence from his naval duties, and, with his witnesses, traveled to Miami, Florida, and actively defended the suit.

6. On August 18, 1938, the court announced its decision, in which it stated that the equities of the case were in the defendant (plaintiff here) and not in the wife, and that

she was not entitled to the relief prayed for, and accordingly ordered and decreed that her bill of complaint and amended bill of complaint be dismissed. That Decree has been read into evidence. The wife's attorney subsequently filed an appeal from the decree dismissing her suit, which appeal was dismissed before it came on for hearing.

7. In the spring of 1939 plaintiff's wife filed, in the same Circuit Court, a second suit for divorce upon the ground of desertion. Plaintiff engaged attorneys to defend this suit, but as he was then stationed on the West Coast, he was unable to obtain sufficient leave to appear at the trial and testify. However, he did give his testimony in the form of a deposition, but was unable to obtain depositions from any other witnesses.

On November 2, 1939, the Circuit Court entered a decree in favor of the wife, granting her the divorce prayed for. This decree, after reciting certain facts relating to the marital relations existing between the parties and those upon which the alleged desertion was based, included the following language:

> For the benefit of the home and society, divorces are restricted to certain grounds. No home is involved here and there has never been a home, and society may be more offended by continuing the marital status than by dissolving it.
>
> It may be that the husband has more of a cause of action against the wife than she has against her husband, but notwithstanding this, the Court does find that the plaintiff's prayer for a decree of divorce should be granted, and it is so ordered.

This decree was read into the record in this case, and is by reference hereby made a part of this finding. It has become final.

Plaintiff incurred an expense of $2,000 in defending the suits filed by his wife, which expense included the cost of travel for himself and his witnesses to Miami, Florida, their subsistence while there, and the fees paid to his attorneys.

8. Plaintiff's wife was, during the period here in question, financially independent and was not dependent upon him for her support. After August 1936 she refused to accept any contributions for her support from plaintiff, and he did not

contribute to her support, although he was willing to do so if she would have accepted it.

9. In December 1938, at the time her appeal from the decree entered in her first suit for divorce was pending in the Supreme Court of Florida, plaintiff's wife wrote to the Navy Department asking to be advised whether plaintiff was still being paid the allowances of an officer with dependents. The Navy Department acknowledged receipt of her letter, but took no action on it other than to refer it to plaintiff for whatever action he chose to take. Plaintiff took no action in the matter.

On March 1, 1939, plaintiff's wife, through her attorneys, wrote to the Bureau of Supplies and Accounts, Navy Department, seeking information as to the pay status of plaintiff, and calling attention to the fact that he and his wife had been separated since August 1936, and that plaintiff had not contributed to her support since that date. The letter was forwarded, through Naval channels, to plaintiff's disbursing officer, and plaintiff was directed to furnish the Bureau of Navigation with a statement explaining the facts in connection with his marital status.

10. On April 18, 1939, plaintiff sent to the Bureau of Navigation a detailed statement concerning his marital status, calling attention, among other things, to the fact that he and his wife were still lawfully married; that he had at all times been willing to support his wife, but that she, having independent means, had declined to accept any contributions to her support from him, and that he had incurred heavy expense in defending her divorce suit; and that his legal obligation to support his wife continued to exist, and that she might, at any time, request support from him.

On April 26, 1939, upon receipt of the plaintiff's statement the Chief of the Bureau of Navigation prepared an endorsement in which he stated that the payment of dependency allowances would, in view of the facts disclosed, appear to be warranted, but recommended that the matter be referred to the Comptroller General for an authoritative decision, and forwarded all the papers to the Chief of the Bureau of Supplies and Accounts. The Chief of the Bureau of Supplies and Accounts on May 1, 1939, referred the papers to the

Secretary of the Navy with the request that a decision be obtained from the Comptroller General.

On May 9, 1939, the Secretary of the Navy referred the matter to the Comptroller General, who, on June 5, 1939, held that plaintiff was not entitled to dependency allowances and recommended that a checkage be imposed against plaintiff on account of the dependency allowances previously paid to him.

11. Plaintiff was paid the active duty pay and allowances of an officer of his grade and rank with dependents until June 5, 1939, when the Comptroller General held that plaintiff was not entitled to dependency allowances.

Since that date he has received the active duty pay and allowances of an officer of his grade and rank without dependents, less the monthly checkages imposed by reason of the alleged overpayment of dependency allowances to him since August 2, 1936.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The question posed by the petition and the foregoing findings of fact is whether plaintiff, a naval officer of the rank of lieutenant during a portion, and lieutenant-commander during the balance, of the time in question, is entitled to the increased rental and subsistence allowances provided for by sections 4, 5, and 6 of the act of June 10, 1922, 42 Stat. 625, 627, as amended by the act of May 31, 1924, 43 Stat. 250.

Section 4 of the act provides:

> That the term dependent as used in the succeeding sections of this Act shall include at all times and at all places a lawful wife, and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent on him for her chief support.

This language of the statute seems to say that a lawful wife or an unmarried minor child shall be a statutory dependent, with no questions asked as to the fact of dependency, just as plainly as it says that a mother shall be regarded as a dependent only if in fact she is chiefly supported by the

officer. There is nothing else in the statute which indicates that this apparent meaning was not the legislative meaning.

The equities of plaintiff's position are in accord with the plain meaning of the statute. Plaintiff had a lawful wife, and the record shows no marital fault on his part. She rejected his proffered support but as a consequence of her conduct put him to great expense.

Robey v. *United States*, 71 C. Cls. 561, is claimed by the Government to be an obstacle to plaintiff's claim. The court did not intend by the language there used to make dependence in fact the test of an officer's right to an allowance for "dependents." To do so would require a perpetual and universal inquisition into the family affairs of officers such as, for example, those whose wives have means of their own and are not at all or only partly supported by their husbands.

The plaintiff in the *Robey* case had deserted and refused to live with his wife. He was not morally entitled to anything because of her, and the court concluded that he was not within the "spirit" of the statute and should not recover. Plaintiff here is fully within both the language and the spirit of the statute.

Plaintiff's counsel stated at the oral argument that the decree of divorce granted the wife on November 2, 1939, by the Circuit Court, had now become final. Plaintiff is entitled to recover the rental and subsistence allowances of an officer of his grade and rank with dependents, for the period from August 2, 1936, to November 2, 1939, in the amount to which such allowances have been denied him or have, after payment to him, been taken from him by the imposition of checkages.

Plaintiff's claim having been a continuing one at the time of the hearing before the commissioner of the court so that the amount of it could not then be finally determined, the entry of judgment will be suspended pending the filing by the General Accounting Office of a statement of the amount due him from August 2, 1936, to November 2, 1939.

It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MATTIE MCMULLIN, EXECUTRIX OF THE ESTATE OF CHARLES F. MCMULLIN, DECEASED, v. THE UNITED STATES

[No. 45006. Decided March 3, 1941. Plaintiff's motion for new trial overruled June 2, 1941]

On the Proofs

Estate tax; jurisdiction under the Revenue Act of 1926.—Where, after the Commissioner of Internal Revenue made a final determination of a deficiency in estate tax, plaintiff took the case to the United States Board of Tax Appeals and the determination of the Commissioner was affirmed by a decision of the Board, which decision became final before the deficiency, plus interest, was assessed and collected; and where it is admitted that the additional tax and interest were not due under a Supreme Court decision rendered prior to the final assessment of said deficiency; it is *held* that the Court of Claims is without jurisdiction to enter judgment, under section 319 (a) of the Revenue Act of 1926.

Same; failure of taxpayer to raise a certain question before the Board.—The failure of a taxpayer who appeals to the Board of Tax Appeals to raise a certain question before the Board does not, in a case instituted before the Board after February 26, 1926, give the taxpayer a right thereafter to bring an original suit in respect of any portion of the tax for the taxable year before the Board.

Same.—The failure of a taxpayer to raise and present to the Board of Tax Appeals on appeal thereto a certain question with reference to the tax liability for the taxable year in question does not limit in any way the finality and conclusiveness of the decision of the Board as to the entire tax liability for the said taxable year, under the applicable provisions of the Revenue Act of 1926.

The Reporter's statement of the case:

Mr. Chase Morsey for the plaintiff. *Mr. William R. Rodenberg* was on the brief.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Mr. Robert N. Anderson* and *Mr. Fred K. Dyar* were on the brief.

In this suit plaintiff seeks to recover $4,112.38 with interest from December 19, 1938, alleged overpayment of additional estate tax and interest.

It is admitted that the additional tax and interest in the total amount mentioned were not due under a Supreme Court decision rendered prior to assessment.

The question presented is whether under the facts and circumstances disclosed by the record this court has jurisdiction to enter judgment in favor of plaintiff for any amount, in view of the fact that after the Commissioner of Internal Revenue made a final determination of a deficiency of $2,132.62 plaintiff took the case to the United States Board of Tax Appeals and the determination of the Commissioner was affirmed by a decision of the Board which became final before the deficiency, plus interest, was assessed and collected.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a resident of the State of Missouri, is the widow of Charles F. McMullin and the duly appointed and qualified executrix of his estate. C. F. McMullin died January 5, 1926. The decedent was also a resident and citizen of the State of Missouri.

Plaintiff and the decedent were married June 28, 1905. No children were born of the marriage and the decedent, at the time of his death, left surviving him no children or other descendents being capable of inheriting. The decedent named the plaintiff, his widow, as the principal beneficiary under his will, the provisions of which were accepted by her. The property which he devised and bequeathed to plaintiff was in excess of one-half of the net value of his estate. Two pertinent paragraphs of the will of the decedent are as follows:

> I devise, bequeath, and give to my beloved wife, Mattie McMullin, all my property, real, personal or mixed of which I am seized or possessed or to which I may be entitled at the time of my decease, wheresoever situated, of all kinds and descriptions, to her absolutely and forever to do as she sees fit, during her lifetime, but at

her death to go as hereinafter set out; but during her lifetime to enjoy the use and income thereof.

* * * * *

All provisions herein made for my wife are in lieu of dower or other statutory provisions made and given to her by the statutes of Missouri.

2. January 5, 1927, plaintiff, as executrix of the estate of her husband, filed a Federal estate tax return showing an estate tax due of $506.44 which was paid on the same date. In this return the executrix claimed that only one-half of the value of the net estate, namely, $108,762.68, constituted assets of the estate for purposes of taxation inasmuch as one-half of the decedent's estate belonged to the widow by operation of law under the statutes of Missouri. May 9, 1928, the executrix paid an additional tax of $123.25, together with interest of $9.85, making of total of $133.10.

3. The return so made for the estate was examined and audited by the Commissioner of Internal Revenue and he finally determined that the value of the gross estate of the decedent was $395,857.91, consisting of real estate in Missouri of the value of $318,421.50 and personal property of the value of $77,436.41; that the allowable deductions therefrom amounted to $211,899.16, consisting of funeral expenses of $3,519.50, executor's commissions of $11,166.74, attorney's fees of $6,600, miscellaneous administration expenses of $9,648.63, debts of decedent of $66,521.38, unpaid mortgages of $64,442.91, and the $50,000 exemption, leaving a net estate for the purpose of the estate tax of $183,958.75. The Commissioner also determined that all of the net estate was subject to the estate tax at the rate specified by the applicable estate tax act and that the wife's one-half should not be excluded from the net estate as claimed by her in the return filed. This determination resulted in a deficiency of estate tax in the amount of $2,843.51, which after a statutory credit for state inheritance tax paid resulted in a net deficiency of $2,132.62. April 24, 1928, the Commissioner prepared and mailed to plaintiff, as executrix, a statutory 60-day deficiency notice under the provisions of section 308 of the Revenue Act of 1926 advising her of his final determination of a deficiency.

4. Under the applicable provisions of the Revenue Act of 1926, plaintiff had the right to elect whether she would institute a proceeding before the United States Board of Tax Appeals for the redetermination of the deficiency determined by the Commissioner or whether she would pay the additional tax so determined, file a claim for refund and, in the event of rejection of such claim in whole or in part bring suit in court to recover the amount for which the claim was rejected. Plaintiff elected to take the case to the Board of Tax Appeals and, on May 28, 1928, filed a petition with the Board for a redetermination of the deficiency disclosed by the Commissioner's decision. The appeal to the Board was based on the contention that the marital interest of the widow should not be included in the gross estate of the decedent for the purpose of determining the net estate subject to the estate tax. At the time of the Commissioner's determination and the filing of the petition with the Board of Tax Appeals, and the date on which the Board rendered its opinion in the case, the decisions of the Treasury Department, of this court, and of the Board of Tax Appeals had all held that the value of real estate situated in the State of Missouri was properly to be included under the estate tax provisions of the revenue statute for the purpose of determining the net estate subject to tax, and the Supreme Court had prior to the Commissioner's determination of the deficiency denied a petition for writ of certiorari to review this court's decision in *Carrie Howard Steedman and Eugenia Howard Edmunds* v. *United States*, 63 C. Cls. 226, to that effect.

In an opinion promulgated by the Board of Tax Appeals August 11, 1930, reported in 20 B. T. A. 527, the Board sustained the decision of the Commissioner and on August 14, 1930, judgment was entered by the Board of Tax Appeals finding a deficiency of $2,844.53, as had been determined by the Commissioner, which, as stated in finding 3, was subject to a credit for state inheritance tax paid by the estate. The facts before the Board of Tax Appeals in the proceeding there instituted by plaintiff were sufficient to show that the decedent was a resident of Missouri and that the items of real estate had been included in the gross estate for the

purpose of determining the net estate upon which the Commissioner determined the deficiency in question. However, the question of the correctness or legality of the inclusion of the value of the real estate situated in Missouri in the decedent's gross estate under section 302 (a) of the Revenue Act of 1924 was not raised or contested by plaintiff and was not involved, considered, or discussed by the Board in the proceeding before it. Plaintiff did not appeal to the Circuit Court of Appeals for the Eighth Circuit or to the Court of Appeals of the District of Columbia from the decision of the Board of Tax Appeals. The decision of the Board entered August 14, 1930, became final February 14, 1931, under the provisions of section 1005 of the Revenue Act of 1926.

November 24, 1930, the Supreme Court handed down its opinion in *Crooks* v. *Harrelson*, 282 U. S. 55, in which it was decided that the value of real estate situated in the State of Missouri was not includable in the gross estate for the purpose of determining the net estate subject to Federal estate tax.

5. On February 26, 1931, the Commissioner of Internal Revenue assessed an additional tax against plaintiff in the amount of $2,132.63, which was the amount of the deficiency of $2,843.51 theretofore determined by him and approved by the Board, less the statutory credit for state inheritance tax paid, together with interest of $530.07, or $2,662.07. Notice was issued by the Collector of Internal Revenue and demand for payment of this additional tax and interest was made upon plaintiff. Thereafter, and before payment, plaintiff sought to compromise the additional tax and made various offers of compromise to the Commissioner, all of which were finally rejected by him August 20, 1935. Thereafter, on October 24, 1935, plaintiff brought suit in equity in the District Court for the Eastern District of Missouri against Thomas J. Sheehan, the then Collector of Internal Revenue for the First District of Missouri, wherein she sought to enjoin the collection of the deficiency and interest, for which demand had been made pursuant to assessment, on the ground that exaction of the tax was illegal in view of the decision of the Supreme Court in *Crooks* v.

Harrelson, supra, and that if the additional tax were paid she would be unable to file a claim for refund because of statutory prohibition on account of having taken an appeal from the final decision of the Commissioner of Internal Revenue to the United States Board of Tax Appeals. At that time, whatever right the estate had to take an appeal from the final decision of the Board of Tax Appeals had expired for the reason that the Board's decision had theretofore become final. The defendant filed a motion to dismiss the bill of complaint, which motion was sustained by the District Court—thereupon plaintiff appealed to the Circuit Court of Appeals for the Eighth Circuit, which, on March 7, 1938, affirmed the order of the District Court in *McMullin* v. *Sheehan*, 95 Fed. (2d) 129, and thereafter the Supreme Court denied a petition for writ of certiorari. Thereafter, on December 19, 1938, plaintiff, having previously filed with the Commissioner of Internal Revenue a waiver extending the period for collection of the additional tax to December 31, 1938, paid under protest to the Collector of Internal Revenue at St. Louis, Mo., the sum of $4,112.38. This amount represented the additional tax of $2,132.63 and interest of $396.97, being the interest of $530.07 assessed February 26, 1931, less an abatement of such interest of $133.10, which amount had previously been paid by plaintiff to the collector on May 9, 1928, together with further interest of $1,582.78 from date of assessment of the deficiency in February 1931 to the date of payment on December 19, 1938. The total interest paid by plaintiff on the deficiency of $2,132.63 collected pursuant to the Commissioner's original determination and decision of the Board of Tax Appeals affirming such decision was $1,979.75.

6. February 23, 1939, plaintiff filed with the Collector of Internal Revenue at St. Louis a claim for refund of the additional tax of $2,132.63 and interest of $1,979.75 theretofore paid on December 19, 1938, as above stated, which claim is in evidence as Exhibit B and is made a part hereof by reference. The claim was rejected in full by the Commissioner of Internal Revenue on July 7, 1939, and this suit was instituted on November 20 following.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

Under the facts set forth in the findings and the provisions of sections 308 (h) and 319 of the Revenue Act of 1926, we are of opinion that this court is without jurisdiction of the claim presented by plaintiff. When the Commissioner of Internal Revenue on April 24, 1928, made a final determination of a deficiency in respect of the tax of the estate of decedent and mailed to the estate a deficiency notice under the provisions of section 308 (a), Revenue Act of 1926, the estate had the right to pay the additional tax and any interest thereon, file a claim for refund, and bring suit in court to recover the whole or any portion thereof, or, to file a petition with the United States Board of Tax Appeals for the redetermination of the deficiency and to raise before the Board any and all issues or questions relating to the correct estate tax liability. The Board had jurisdiction to determine not only whether the deficiency had been correctly and legally determined but whether the estate had made an overpayment of tax on the return filed. *Peerless Woolen Mills v. Commissioner of Internal Revenue*, 13 B. T. A. 1119, 1125. In this case plaintiff filed a petition with the U. S. Board of Tax Appeals May 28, 1928, and the only question then raised and presented by plaintiff was that the marital interest of the widow should not have been included in the gross estate of the decedent for estate tax purposes. The facts upon which this issue was raised before the Board and the facts set forth in the deficiency notice, upon the basis of which the petition was filed with the Board, disclosed that real estate situated in Missouri had been included in the decedent's gross estate for the purpose of determining the net estate subject to tax, but no question with reference to the inclusion of the value of such real estate was raised by plaintiff before the Board. But the failure of a taxpayer who appeals to the Board of Tax Appeals to raise a certain question before the Board does not, in a case instituted before the Board after February 26, 1926, give the taxpayer a right thereafter to bring an orig-

inal suit in respect of any portion of the tax for the taxable year before the Board. Nor does the failure of a taxpayer to raise and present to the Board a certain question with reference to the tax liability for such taxable year limit in any way the finality and conclusiveness of the decision of the Board as to the entire tax liability for the year involved. Section 308 (a) provides for the mailing of a deficiency notice and gives the taxpayer the right to take the Commissioner's determination before the Board. Subdivision (b) provides that if the executor files a petition with the Board, the entire amount redetermined as the deficiency by the decision of the Board, which has become final, shall be assessed and shall be paid upon notice and demand from the collector. Subdivision (g) of section 308 and sections 1001 (a) and 1005 (a) (1) provide that the decision of the Board in a case where no petition for review is filed shall become final six months after the decision is entered and subdivision (h) of section 308 provides that "Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the due date of the tax to the date the deficiency is assessed, * * *." Other provisions of the statutes making certain exceptions with reference to the period in which interest is collectible are not material here. Section 309 (b) provides that "Where a deficiency, or any interest assessed in connection therewith under subdivision (h) of section 308, * * * is not paid in full within 30 days from the date of notice and demand from the collector, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of 1 per centum a month from the date of such notice and demand until it is paid."

Section 319 (c) provides that "If the Board finds that there is no deficiency and further finds that the executor has made an overpayment of tax, the Board shall have jurisdiction to determine the amount of such overpayment, and such amount shall, when the decision of the Board has become final, be credited or refunded to the executor as provided in section 3220 of the Revised Statutes, as amended." And

it also provides that such refund shall be made either (1) if claim therefor was filed within the period of limitation provided for by law, or (2) if the petition was filed with the Board within four years after the tax was paid, or, in the case of a tax imposed by the estate tax title of the 1926 act, within three years after the tax was paid. Section 319 (a) (2), which are the only other provisions of section 319 pertinent to the question presented by the case at bar, provide as follows:

> (a) If the Commissioner has mailed to the executor a notice of deficiency under subdivision (a) of section 308 and if the executor after the enactment of this Act files a petition with the Board of Tax Appeals within the time prescribed in such subdivision, no refund in respect of the tax shall be allowed or made and no suit for the recovery of any part of such tax shall be instituted in any court, except— * * *
>
> (2) As to any amount collected in excess of an amount computed in accordance with the decision of the Board which has become final; * * *.

The facts show that the decision of the Board, that there was a deficiency, was entered August 14, 1930, and became final and conclusive under the statute on February 14, 1931, and that the deficiency of $2,132.63, being the amount of $2,843.51 determined by the Board after the allowance of a statutory credit of $710.88 for state inheritance tax, was duly assessed February 26, 1931, in accordance with the provisions of section 308 (b), together with interest of $530.07 from the due date of the tax to the date of assessment in accordance with subdivision (h) of that section. Upon receipt of the assessment, the collector gave notice and made demand for payment of the deficiency and interest so assessed, but, for the reasons set forth in the findings, plaintiff did not make any payment under the assessment until December 19, 1938. On that date plaintiff paid a total sum of $4,112.38 which it seeks to recover in this proceeding. This amount represented the deficiency of $2,132.63 plus interest of $1,979.75. The interest of $1,582.78 collected on the deficiency in excess of the net interest of $396.97 assessed by the Commissioner thereon under the provisions of section 308 (h) represented interest imposed by and col-

lected under section 309 (b) for failure of plaintiff to pay the deficiency and interest theretofore assessed within 30 days after the date of notice and demand by the collector for payment of the amount of the assessment.

Within three years after the additional tax and interest was paid plaintiff filed a claim for refund thereof, which claim was rejected on the ground that the decision of the Board was final and that allowance of any refund was prohibited by section 319 (a). Plaintiff insists that it is entitled to maintain this suit and to recover the additional tax deficiency and interest collected for the reason that assessment and collection thereof were illegal because of the inclusion in the gross estate of the value of the real estate situated in the state of Missouri in direct disregard of the decision in *Crooks* v. *Harrelson*, 282 U. S. 55, which had been decided before the deficiency and interest was assessed and collected. The case of *Crooks* v. *Harrelson*, *supra*, was decided November 24, 1930, and it is conceded by defendant that if the rule announced in the decision in that case had been applied and followed by the Commissioner no deficiency or interest would have been due by the estate. But, in view of the provisions of the Revenue Act of 1926 hereinbefore referred to, that fact does not give this court jurisdiction to entertain this suit. *Bankers Reserve Life Co.* v. *United States*, 71 C. Cls. 279; *Brindley* v. *Heiner*, 38 Fed. (2d) 489. Plaintiff elected to take the case to the United States Board of Tax Appeals and permitted the decision of the Board to become final, and under the clear provision of the statute this court is without authority to inquire into the correctness or legality of the deficiency determined by the Board and assessed by the Commissioner, or to entertain a suit with respect to any interest collected on such deficiency in strict accordance with the provisions of the statute. Moreover, the decision of the Board did not become final until nearly three months after the Supreme Court had decided the case of *Crooks* v. *Harrelson*, *supra*, during which time the plaintiff could have applied to the Board for a rehearing and the correction of its decision to accord with the decision of the Supreme Court, or it could

have raised this question of law by an appeal to the proper court of appeals after the decision in *Crooks* v. *Harrelson* case and before the decision of the Board became final. *Legg's Estate et al.* v. *Commissioner of Internal Revenue*, 114 Fed. (2d) 760.

The petition must be dismissed. It is so ordered.

Whitaker, *Judge;* Green, *Judge;* and Whaley, *Chief Justice*, concur.

MARYLAND CASUALTY COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 45008. Decided March 3, 1941]

On the Proofs

Government contract; collection of both liquidated damages and excess costs.—Where the Government, in accordance with the terms of a construction contract, because of delay and default on the part of the contractor terminated said contract after the time provided for the completion thereof, and took over and completed the work; it is *held* that the Government may not collect both (1) liquidated damages for the period that elapsed after the time provided for completion and before the Government exercised its option to terminate said contract and (2) the excess costs which were incurred by the Government in completing the work.

Same; waiver.—The defendant, having exercised its right to terminate a construction contract and to proceed with its completion, thereby waived its claim to liquidated damages.

Same; salary of architect part of extra costs.—Where the Government terminated a construction contract because of delay and default on the part of the contractor and completed the work, and where a regularly employed architect remained on the job continuously during the time the Government was actually engaged in completing the work; it is *held* that the salary of said architect for said period was properly included as a part of the excess costs of completing said work.

The Reporter's statement of the case:

Mr. Robert C. Handwerk for the plaintiff.

Mr. Charles H. McCarthy, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. The plaintiff, Maryland Casualty Company, is a corporation duly organized and existing under the laws of the State of Maryland and is engaged in the bonding and insurance business with principal office in Baltimore, Maryland.

2. Under date of June 7, 1935, the defendant, United States, through Roger W. Toll, Superintendent, National Park Service, Department of the Interior, entered into a written contract (No. I-17P-1222 P. W., P. W. Project FP-347) with B. O. Siegfus, trading as Siegfus Brothers, of Salt Lake City, Utah, for the furnishing of all labor and materials and performance of all work required for the construction of an apartment building in accordance with specifications, drawings, and schedules, all of which were made a part of the contract. A copy of the contract is attached to the petition, marked "Exhibit A," and made part hereof by reference. The amount of the contract is $76,989.00. During the performance of the contract the defendant authorized additions thereto in the form of work orders Nos. 1 to 8, inclusive, which increased the contract price in the amount of $1,352.69, and made deductions for two items totaling $42.00, or a net addition of $1,310.69, making a total contract price of $78,299.69. A copy of the specifications is filed herewith as Plaintiff's Exhibit 1 and made part of this finding by reference.

3. Also on June 7, 1935, B. O. Siegfus, trading as Siegfus Brothers, as principal, and the plaintiff, Maryland Casualty Company, as surety, executed and delivered to the defendant a performance bond in favor of the defendant as obligee, in the sum of $76,989.00, conditioned for the faithful performance of the contract, a copy of which is attached to the petition as Exhibit B and made a part hereof by reference.

4. The contractor received notice of award from defendant on October 3, 1935. The aforementioned work orders Nos. 1 to 8, inclusive, increased the contract time for completion by 21 days. Due to inclement weather, performance of the work was stopped from November 1, 1935, to

May 14, 1936, inclusive, making the contract time for completion November 24, 1936.

5. On February 15, 1937, defendant, through Edmund B. Rogers, Superintendent, Yellowstone National Park, wrote Siegfus Brothers, as follows:

> Reference is made to Contract I–17P–1222 PW between yourselves and the Government covering the construction of the Utility building in Yellowstone National Park.
>
> As previously advised satisfactory progress is not being made on the above project. The pay rolls on the project have not been met for the past six weeks. In view of the above it is necessary to advise you that unless your pay rolls are met and satisfactory progress toward the early completion of the building is shown by February 23, 1937, your right to proceed with the work will be terminated as provided in Article Nine of your contract.
>
> Please acknowledge receipt of this letter.

Receipt of the above letter was acknowledged by Siegfus Brothers February 15, 1937. A copy of the letter was sent to the Maryland Casualty Company, plaintiff.

6. On February 23, 1937, the defendant, through Edmund B. Rogers, Superintendent, Yellowstone National Park, wired Siegfus Brothers at Salt Lake City, Utah, as follows:

> Notice is hereby given you right proceed under your contract construction Utility Building, Yellowstone Park, Wyoming, terminated this date because unsatisfactory progress Stop Letter follows Stop Please acknowledge.

The above-mentioned telegram was confirmed by the following letter of same date addressed to Siegfus Brothers, at Salt Lake City:

> The following telegram sent you today is hereby confirmed:
>
> "Notice hereby given you right proceed under your contract construction utility building Yellowstone Park Wyoming terminated this date because unsatisfactory progress Stop Letter follows Stop Please acknowledge."
>
> Associate Architect Gebhardt has been directed to warn you and your representatives from the premises

> and to take possession of all tools, materials, and machinery, etc., belonging to you on the site. He will prepare an inventory of all materials, tools, and equipment on the site, with your representative, Mr. Urban Andersen.
>
> Please acknowledge receipt of this notice.

A copy of the above letter was sent to the Maryland Casualty Company, plaintiff.

On the same date the said superintendent wired plaintiff at Salt Lake City as follows:

> Siegfus Brothers right to proceed utility building contract terminated this date. Advise immediately whether or not you desire complete contract as surety on contractor's bond. Arrangements must be made meet accrued pay rolls immediately,

confirming same by the following letter of even date addressed to plaintiff in Salt Lake City, Utah:

> With reference to Siegfus Brothers Contract No. I-17P-1222 PW, covering the construction of the Utility Building, YNP., we today served notice on Siegfus Brothers that their right to proceed with the work has been terminated this date because of unsatisfactory progress, as per written notice to Siegfus Brothers, copy attached.
>
> We today gave you telegraphic advice of action taken as follows:
>
> "Siegfus Brothers right to proceed Utility Building contract terminated this date Stop Advise immediately whether or not you desire complete contract as surety on contractors bond Stop Arrangements must be made meet accrued payrolls immediately."
>
> You are requested to acknowledge the receipt of this letter, stating whether or not you desire to complete this work as surety on the above contractor's bond.

7. On March 13, 1937, plaintiff addressed an air mail letter to Superintendent Rogers advising the defendant that it did not desire to complete the contract. Photostat copy of such letter is filed herein as Plaintiff's Exhibit 2 and made a part of this finding by reference.

8. Thereupon the defendant took over the work and prosecuted it to completion.

9. Before the termination of the contract by the defendant, it had paid to the contractor $68,993.28. The excess costs to defendant occasioned by its taking over the work and prosecuting it to completion amounted to $4,994.16.

10. Upon final settlement the United States deducted $4,994.16 representing excess costs; $3,185.00 liquidated damages for 91 days at $35.00 per day from November 24, 1936, to February 23, 1937; and $826.65, associate architect's salary for inspection of the work while the defendant was completing same; making total deductions of $9,005.81, and allowed $300.60 in favor of plaintiff herein. Plaintiff refused to accept the settlement and under date of June 29, 1939, returned to defendant its check in settlement thereof.

11. During the performance of the contract by the contractor the defendant had on the job as its representative in the inspection of the work, one William H. Gebhardt, an associate architect. Gebhardt was employed by defendant at $3,200 per annum. He was retained on the job by defendant during the period February 24, 1937, to May 26, 1937, and his salary was charged against the contract in the sum of $826.65.

12. The plaintiff's losses in payment of labor and material bills under its performance bond in favor of defendant, which bills were incurred by the contractor in connection with the contract, amounted in the aggregate to a sum in excess of the amount claimed by plaintiff in this suit.

13. Defendant was not responsible for any of the delay in the prosecution of the work.

14. The contracting officer correctly computed and granted correct extensions of time under the provisions of the contract.

15. There is no proof that the Superintendent of Yellowstone National Park, who succeeded the contracting officer, acted under any mistake of fact or in bad faith in terminating the right of the contractor to proceed with the work.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This case is submitted on stipulated facts. No testimony was taken.

Two questions are presented:

1. In a defaulted construction contract may the Government collect liquidated damages for the period that elapsed after the time provided for the completion of the contract and before the time the Government exercised its option to terminate the right of the contractor to proceed with the contract; and also collect the excess costs which were incurred by the Government in completing the contract?

2. May the Government charge against the contract as a part of the excess costs the salary of a regularly employed architect who remained on the job continuously during the time the Government was actually engaged in completing the work?

The first question depends upon the construction of the contract.

Article I of the contract provided in general terms liquidated damages for delay in the completion of the contract at the rate of $35 per day for each calendar day after the time set for completion until the work should be completed and accepted.

Article IX of the contract is as follows:

> If the contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in article 1, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess cost occasioned the Government thereby. If the contractor's right to proceed is so terminated, the Government may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. If the Government does not terminate the right of the contractor to proceed, the contractor shall continue the work, in which event the actual damages for the delay will be impossible to determine and in lieu thereof the contractor shall pay to the Government as fixed, agreed, and liquidated

damages for each calendar day of delay until the work is completed or accepted the amount as set forth in the specifications or accompanying papers and the contractor and his sureties shall be liable for the amount thereof: *Provided*, That the right of the contractor to proceed shall not be terminated or the contractor charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe weather or delays of subcontractors due to such causes: *Provided further*, That the contractor shall within 10 days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of facts thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of time for completing the work shall be final and conclusive on the parties hereto.

The time set for completing the contract after allowing for work order changes and inclement weather, which are not involved here, was November 24, 1936.

On February 23, 1937, the Government gave notice to the contractor that his right to proceed with construction under the contract was terminated because of unsatisfactory progress. On March 13, 1937, the surety company advised the Government that it did not desire to complete the contract. Thereupon the Government took over the work and prosecuted the same to completion.

In making settlement with the surety company the Government withheld $3,185 as liquidated damages at $35 per day for the 91 days between November 24, 1936, and February 23, 1937. It also deducted $4,994.16 as excess costs incurred in the completion of the contract, and in addition thereto, as a part of the excess costs, $826.65 architect's

salary for the inspection of the work while the defendant was completing the contract.

The Government's counsel contends that under the terms of the contract it was permitted to recover the liquidated damages for the 91-day period; that these damages had accrued under the terms of the contract before notice of termination and that after the termination the Government is entitled to excess costs.

We think that Article I and Article IX must be construed together.

Article IX being the specific provision should be controlling.

Article IX gives the Government the choice of permitting the contractor to continue and collecting $35 per day as liquidated damages for delay, or of pursuing the other course by taking over and finishing the work, and collecting the excess costs incurred in the completion of the contract.

By its terms it does not give the Government the right to collect both.

The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages. *Fidelity Casualty Co. of New York* v. *United States*, 81 C. Cls. 495; *Commercial Casualty Insurance Co.* v. *United States*, 83 C. Cls 367; *American Employer's Insurance Company of Boston* v. *United States*, 91 C. Cls. 231; *U. S. for Use and Benefit of General Lighterage Company* v. *Maryland Casualty Co.*, 25 *Fed. Supp.* 778.

In each of these cases the work was completed after the Government had terminated the right of the contractor to proceed. In the *Fidelity* case, *supra*, the Government terminated the contract on the day that had been fixed for completion of the work. In each of the cases the work was actually completed after the date that had been fixed in the contract. In each of the cases the Government had been subjected to whatever damages might have been caused by the delay in completing the contract. It was held, however, that since the contractor's right to proceed in each case had been terminated, the defendant had chosen

its course of procedure and would be limited to the excess costs incurred in the completion of the work. The *General Lighterage Company* case, *supra* (District Court, Maine), is in all respects similar to the case at bar. The issues involved in the two cases are identical.

The instant case is clearly distinguishable from the *American Employer's Insurance Co.* case. In the latter case, a separable portion of a divisible contract which was to be completed at an earlier date had already been completed, but not within the date specified in the contract. The liquidated damages that attached to the delay in construction of that particular building had already accrued and had become due prior to the date of cancellation. The cancellation, therefore, was as to the other portion of the contract.

Defendant's counsel contends that if this construction is allowed to prevail, the contractor could avoid liquidated damages by stopping just before the completion of a contract and forcing the Government to finish the contract, in which event the Government would not be able to collect the damages for the delay.

It might be said just as logically that the Government might by delay where the contractor was making little effort to complete the contract, collect the entire amount of the contract in liquidated damages. Both of these propositions assume bad faith. No bad faith is alleged here.

The defendant had the right to terminate the contract at any time after November 24, 1936. It did not choose to do so until February 23, 1937. At that time it did exercise its choice, and having done so, was bound thereby. The defendant therefore is not entitled to charge the item of $3,185 as liquidated damages.

As to the second proposition, the question of the architect's salary: It was necessary for an architect to be continuously on the job throughout the entire period during which the contractor was working. It was necessary for the architect to remain and he did remain on the job continuously during the entire time the Government was engaged in completing the contract. The Government asks to deduct the salary of the architect only for the period

during which it was engaged in the actual work of completing the contract. This entire period was after the time set for the completion of the contract. We find that the services of the architect during this latter period were necessary and a part of the excess costs. The defendant, therefore, should be allowed to deduct this item of $826.65 as a part of the excess costs. *Nalle* v. *United States*, 51 C. Cls. 43, 50.

The defendant is entitled to deduct the sum of $4,994.16, plus the item of $826.65, a total of $5,820.81, representing the excess costs of completing the contract.

After deducting the excess costs there is a balance due plaintiff of $3,185, the amount incorrectly deducted as liquidated damages, and $300.60, the amount which defendant admits is due, or a total of $3,485.60. Judgment will be entered for the plaintiff for the sum of $3,485.60.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, dissenting:

I am unable to agree with the majority opinion. For a failure to complete the contract on time the defendant had two remedies: (1) It might permit the contractor to continue the work, in which event it was entitled to collect from him a stipulated sum as damages for the delay; (2) It might terminate the contractor's right to proceed and itself take over the work.

When the plaintiff in the case at bar failed to complete his contract on time the defendant chose to allow him to continue the work. In such event, the contract expressly provides that the contractor shall become liable to the defendant for damages for the delay in a stipulated sum per day. His failure to complete the work on time was a continuing default until the work was actually completed. This default continued for 91 days, whereupon, the defendant availed itself of the other remedy provided for, to wit,

terminating the contractor's right to proceed further and then taking over the work itself.

Upon the termination of the contract the provision for liquidated damages was no longer operative under our decisions in the cases cited in the majority opinion, but until the contract was terminated, this provision was operative. We have never held to the contrary. In none of the cases cited in the majority opinion was the contractor permitted to proceed beyond the limit of the contract period; hence, the provision for liquidated damages never became operative. But in this case it did become operative. It becomes inoperative only upon the date that the defendant cancels the contract.

It is my opinion, therefore, that the defendant is entitled to collect the stipulated damages from the expiration of the contract period to the date of termination and, in addition, is entitled to collect the excess costs incurred incident to its completion of the work.

I agree with the majority opinion that the defendant is entitled to include in the excess costs the salary of the architect who remained on the job.

MADDEN, *Judge*, dissenting in part:

I agree with the decision of the court as to the second question stated by Judge Jones in his opinion. As to the first question stated, I disagree.

The provision of the contract for liquidated damages for delay, and the other provision for the recovery of excess costs if the work is completed by the Government, are not alternative provisions and are not aimed at the same default on the contractor's part. If the contractor completes the work late, the Government gets the structure at exactly the contract price. But it has been denied the use of the structure for the period of the delay and hence gets the liquidated damages as compensation, the actual damages being agreed as being "impossible to determine." The Government has suffered no addition to the contract price, but that does not prevent it

from obtaining compensation for the default that has occurred, viz, the delay.

There is nothing in the contract which requires the Government to choose as if the two provisions were alternative, when, in fact, one is intended as a remedy for delay and the other is intended as a reimbursement for excess costs. If, as in all the cases cited in the opinion of the court, except the *General Lighterage Company* case, the work is not allowed to remain in the hands of the contractor beyond the time agreed for completion, there is reason for not permitting the Government to claim liquidated damages for delay in completion. An inquiry would have to be made to determine whether the Government itself used due diligence, or all possible diligence, in completing the work and thus mitigating the liquidated damages. And what the standard of the Government's diligence should be is not set out in such contracts because the Government has not agreed to do the work but only reserved the privilege of doing it if it chooses.

So long, however, as the work is left in the hands of the contractor, the delay in completion is his sole responsibility, and there is no reason why he should escape the agreed remedy for it by the easy expedient of prolonging it to a time when the Government, needing the facilities contracted for, must take over and complete the work. If this becomes the established doctrine, the practice of the Government, often advantageous to both parties, of refraining from taking over the work even though it seems certain that it will not be completed on time, in the hope that the contractor, spurred by the liquidated-damages clause, will bend every effort toward a completion as soon as possible after the time, will no longer be prudent, since the contractor can often serve his interests better by doing nothing and thus compelling the Government to take over the work and forfeit the liquidated damages already accrued than by proceeding diligently.

I see no reason for reading into the contract a provision which is not there, when the ends served by such interpolation are neither equitable nor otherwise desirable.

I therefore would decide the case as Judge Whitaker has suggested in his dissenting opinion.

Syllabus

THE FRANKLIN LIFE INSURANCE COMPANY v. THE UNITED STATES

[No. 45045. Decided March 3, 1941] *

On the Proofs

Transfer tax under title VIII of the Revenue Act of 1926, as amended; life-insurance policies registered under Illinois law.—Where a life-insurance company, organized under the laws of Illinois, exercised its option under the insurance laws of said State to deposit with the Director of Insurance of said State securities equal in value to the reserves on a certain group of policies to be designated as "registered policies," and where such policies were thereupon registered by the Director of Insurance, and appropriately stamped to certify such registration, showing that approved securities equal in value to the legal reserves thereon were "held in trust" by the insurance department for the benefit and security of the members, policyholders or creditors of said insurance company; it is *held* that such transactions constituted transfers of legal title to such securities so deposited and as such were subject to the Federal stamp tax imposed under title VIII of the Revenue Act of 1926, as amended.

Same; constitutionality.—Where under the laws of the State of Illinois it was optional with an insurance company organized under the laws of said State to register with the State Director of Insurance its policies by the deposit of securities equal in value to the legal reserve of such policies; it is *held* that such registration by the State was not an essential governmental function exercised pursuant to the police power of the State, and a Federal tax imposed on such transaction was not unconstitutional as imposing a direct burden upon the exercise by a State of its governmental function. *Ambrosini* v. *United States*, 187 U. S. 1, distinguished.

Same.—The courts should not declare a statute unconstitutional unless its unconstitutionality is free from doubt.

Same; immunity from federal taxation.—It is well settled that the mere fact that some benefit is conferred by State law does not make the acts done in connection therewith by another party, or even the acts of the State itself, immune from Federal taxation.

Same.—Any State has the right under its police powers to regulate and control the issuance of life-insurance policies in such a manner as to protect the interests of the policyholders.

*Certiorari denied.

The Reporter's statement of the case:

Mr. Warren W. Grimes for the plaintiff.

Mr. H. L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, upon the stipulation of the parties:

1. Plaintiff is a corporation organized and existing under the laws of the State of Illinois, with its principal place of business in the City of Springfield in that State, and is engaged in the business of making and selling life insurance, including accident, health, and endowment risks in Illinois and other States of the United States.

2. Under the laws of the State of Illinois in force since March 26, 1869 (Smith-Hurd, Illinois Revised Statutes, 1931, Chapter 73), every life insurance company doing business in that State is required to file with the Insurance Superintendent an annual statement of its business standing and affairs showing, among other things, the amount and character of its assets and investments, the amount and kind of each outstanding policy of insurance, and other information necessary to the determination of the financial condition of the company. The Superintendent of Insurance is authorized to make annual net valuations of all outstanding policies computed by the standard of valuation established by said laws, and all other obligations of every life insurance corporation doing business in the State, and the Company is required to maintain assets (reserves) in approved securities and investments equal to all its liabilities, including the net value of its policies computed upon the net premium basis; the standard for valuation of policies issued before January 1, 1908, being the actuaries or combined experience table of mortality with interest at 4 per centum per annum, and for policies issued on or after said date, the American experience table of mortality with interest at 3½ per centum per annum.

3. Under the laws of the State of Illinois (Smith-Hurd, Illinois Revised Statutes, 1931, Chapter 73) in force from

July 1, 1899, the effective date of the Act, approved April 18, 1899, to June 30, 1937, when registration was discontinued by law, any life insurance company incorporated under the laws of that State might elect to deposit securities with the Director of Trade and Commerce (Director of Insurance) equal to the reserve on a certain group of policies to be designated as registered policies. Such policies were thereupon registered by the Director of Insurance, and each such policy had a certificate on its face signed by the superintendent and sealed with the seal of his office, in the following words:

> This policy is registered; and approved securities, equal in value to the legal reserve hereon, are held in trust by this department.

Such policies and bonds were known as registered policies and annuity bonds.

4. At all times, before and after the discontinuance of registration, such companies have been required to maintain their security deposits with the Director of Insurance in an amount at least equal to the reserves required to cover such policies or bonds as had been registered and still remained in force; periodic revaluations being provided for, not only of the increased or decreased value of such policies or bonds, but also of the securities on deposit.

5. Upon the failure of any company to maintain its deposits as required, the state statutes provide that after sixty days' notice by the Director of Insurance such company shall be deemed insolvent and shall be proceeded against as such.

6. During the period of deposit, all securities are and must be included among the company assets on balance sheets and Annual Statements required to be filed with the state. No authority exists in the Director of Insurance or any other department or agency of the State, by statute, agreement or otherwise, to dispose of such deposited securities except back to the depositing company or at the direction of the depositing company; except upon insolvency, procedure for which is provided by special statutes on liquidation, dissolution, or rehabilitation of insurance companies.

7. During the period of deposit, depositing companies have the right to withdraw any security or to substitute others of equal value and character in their stead, subject only to the maintenance of the required balance; and so long as the depositing company is solvent and keeps up its deposits, it may collect the interest, coupons, and other income on the securities deposited as the same accrues. In practice, the Company calls for and receives from the Director of Insurance, in advance of maturity dates, any interest-bearing coupons upon which it makes its own collections.

8. The plaintiff elected to take advantage of the foregoing provisions of the laws of the State of Illinois in respect to the deposit of reserves and the registration of policies and annuity bonds, and from time to time has both deposited with and withdrawn securities from the Director of Insurance under these statutes.

As to unregistered bonds so deposited, the plaintiff used a legend stamped across the face of the bond, as follows:

> This (*bond*) is the property of and deposited by the The Franklin Life Insurance Company, of Springfield, Illinois, with the Director of Insurance of the State of Illinois, and held by him in trust for the benefit and security of the members, policyholders, or creditors of the said The Franklin Life Insurance Company, as required by and pursuant to the laws of the State of Illinois. It is not negotiable or transferable until withdrawn from said trust, at which time it shall be endorsed by the Director of Insurance.

The form of endorsement used by the Director of Insurance is by rubber stamp and as follows:

> Withdrawn from above trust this_________________ day of ___________________, A. D. 19__. Without recourse on me.
>
> ___________________________________
> as Director of Insurance of the State of Illinois.
>
> Acknowledged before me this ________________ day of __________, 19__.
>
> ___________________________________
> Notary Public. My commission expires
> ___________________

9. Prior to October 1939, neither the plaintiff nor the State purchased or used Federal documentary transfer stamps under Schedule A-9 of Title VIII of the revenue act of 1926 as added by section 724 (a) of the revenue act of 1932.

10. On October 2, 1939, the Collector of Internal Revenue at Springfield, Illinois, required the plaintiff to purchase, and plaintiff did purchase from him and cancelled, such documentary stamps to cover such bond deposits and withdrawals beginning January 14, 1936, and ending August 8, 1939; the deposits amounting to a total of $5,443,000, and the withdrawals amounting to $1,162,000; the said stamps amounting to $2,177.20 and $564.80 on the respective sums, or a total in stamps of $2,742.

11. Under date of November 3, 1939, the plaintiff filed with the Collector on the prescribed form No. 843 a claim for refund of the amount of $2,742. The grounds relied upon in the claim were:

(a) Neither the deposits of the securities with the State Insurance Department nor their return to the taxpayer constituted a transfer or delivery as contemplated by Schedule A-9 of Title VIII of the revenue act of 1926 as added by section 724 (a) of the revenue act of 1932; and

(b) Congress has no power to impose such a tax on transactions in which a State must always be one of the parties under the circumstances in this case.

On November 20, 1939, the Commissioner of Internal Revenue rejected the claim.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff was required by the Commissioner of Internal Revenue to pay stamp taxes on securities deposited by it with the Director of Insurance for the State of Illinois. It claims the taxes were unlawfully exacted and seeks to have them refunded.

The plaintiff is an insurance corporation organized under the laws of the State of Illinois with its principal place

of business in the City of Springfield. Under the laws of that state during the period involved in this case any life-insurance company incorporated in Illinois might elect to deposit securities with the Director of Trade and Commerce (Director of Insurance) equal to the statutory reserve on a certain group of policies to be designated as registered policies. Such policies were then stamped by the Director of Insurance and the following legend placed thereon:

> This policy is registered; and approved securities, equal in value to the legal reserve hereon, are held in trust by this department.

While the securities were legally transferred to him, the Director of Insurance was not authorized to dispose of the deposited securities except to exchange them with the depositing company for others of equal or greater value. Upon insolvency of the insurance company, however, or failure to maintain its deposits as required, the insurance act provides a special procedure under which, after appropriate court order, the Director of Insurance appoints a receiver who operates the company for the benefit of the policyholders. The depositing insurance company, on the other hand, could not withdraw the bonds without substituting ones of equal value and quality.

The plaintiff elected to issue registered policies and from time to time has both deposited with and withdrawn securities from the Director of Insurance under the Illinois statute. Unregistered bonds were merely deposited in trust with the Director and the following legend was stamped across the face of each:

> This (*bond*) is the property of and deposited by The Franklin Life Insurance Company, of Springfield, Illinois, with the Director of Insurance of the State of Illinois, and held by him in trust for the benefit and security of the members, policyholders, or creditors of the said The Franklin Life Insurance Company, as required by and pursuant to the laws of the State of Illinois. It is not negotiable or transferable until withdrawn from said trust, at which time it shall be endorsed by the Director of Insurance.

On October 2, 1939, the collector of internal revenue at Springfield, Illinois, required the plaintiff to purchase documentary stamps to cover bond deposits and withdrawals from January 14, 1936, through August 8, 1939. These deposits totalled $5,443,000 and the withdrawals $1,162,000, the stamps thereon amounting to $2,177.20 and $564.80, respectively, or a total of $2,742. Plaintiff filed a claim for refund of the $2,742 on November 3, 1939, which was rejected by a letter of the Commissioner of Internal Revenue dated November 20, 1939.

The first question to be determined is whether the transactions involved are subject to the Federal stamp tax.

The statute provides (Schedule A–9 of Title VIII of the Revenue Act of 1926, as added by Section 724 (a) of the Revenue Act of 1932) that the tax shall be imposed upon—

> all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the instruments mentioned or described in subdivision 1 and of a kind the issue of which is taxable thereunder, whether made by any assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not), * * * (47 Stat. 169, 274).

This statute has been uniformly construed by the Bureau of Internal Revenue to impose a tax on the mere physical delivery of a described security unless such delivery is expressly exempted from the tax, for example, delivery to or by a broker in the course of a sale.

The contention of the plaintiff that the statute does not apply to transfers of bonds under section 241 of the Insurance Laws of the State of Illinois is largely based on the fact that no beneficial interest was acquired in the transaction by the Director of Insurance. Plaintiff concedes that the legal title to the bonds was by the transfer conveyed to the Director. Indeed, the Illinois statute provides (1899 act, section 240 (1)) that the securities "shall be legally transferred * * * to him" and "shall be held by him in trust." It is true that the transaction did not

involve the transfer of a beneficial interest but in the case of *Founders General Corp.* v. *Hoey*, 300 U. S. 268, 274, it was said "that fact is, in view of the language of the Act, without legal significance." In the case before us the taxpayer transferred the legal title to the security and thereby gave the Director of Insurance the right to hold it under certain conditions. The transfer of the legal title was expressly made subject to the tax by the revenue act and we think the case cited above is decisive against plaintiff's contention that the statute does not cover the transaction in question.

Plaintiff also urges that if the transfers in question are included in the provisions of the Federal stamp tax statute the tax is unconstitutional as imposing a direct burden upon the exercise by a state of its governmental functions.

In order to sustain this contention two matters must be established. The first is that it must appear that the permissive registration of insurance policies is an essential governmental function exercised pursuant to the police power of the state. The second is that the tax imposes a direct burden on the exercise of that function. A difficult and somewhat doubtful question is thus raised, but on the whole we think the statute is constitutional.

Upon examination of the registration provisions we find that they relate only to companies incorporated in Illinois, although foreign companies are authorized to do business in the state and actually do issue a very large proportion of the life insurance policies sold there. The registration provisions apply to all policies issued by Illinois companies whether to citizens within or outside the state. Much less than half of the insurance in force by Illinois companies has been issued to residents of that state. Plaintiff argues that the registration provisions of the Illinois statute were enacted to protect the residents of the state. It would seem rather that the purpose was to give Illinois insurance companies an opportunity to hold out some special advantage to those who were considering taking out the life insurance policies. But we think these facts are not controlling in the case.

A special feature of the registry act was that it was optional with the insurance companies whether or not they so registered policies. It was the insurance company and not the state that decided what should be done. Section 240 provides that a domestic corporation "may deposit" securities with the insurance superintendent for the purpose of issuing registered policies. The only mandatory provision of the act is that after electing to issue registered policies the company must continue to issue only such policies until the insurance in force exceeds $20,000,000, after which it may discontinue registration. It should also be observed that the registration statute did not increase the amount of legal reserves required but merely provided that a special method might be used in taking charge of such reserves.

The case of *Helvering* v. *Gerhardt*, 304 U. S. 405, 419, 420, contains an elaborate discussion of the constitutional question of state immunity to taxation, and while it does not directly decide the question now presented we think a logical conclusion from the rules laid down in the opinion will not sustain the plaintiff's position. It is quite evident from what is said therein that the mere fact that the tax affects some form of state activity "or [is one] whose economic burden reaches in some measure the state or those who serve it" will not cause the tax "to be set aside as an infringement of state sovereignty" (p. 417), and it is shown that the immunity of the state is more narrowly restricted in those cases where the tax is not collected from a state treasury but from individual taxpayers (p. 418) even though the state itself might be held immune. It is further said (p. 419) that there are "two guiding principles of limitation for holding the tax immunity of state instrumentalities to its proper function." One excludes from the immunity "activities thought not to be essential to the preservation of state governments even though the tax be collected from the state treasury," as it was not in the case before us. The other principle is "exemplified by those cases where the tax laid upon individuals affects the state only as the burden is passed on to it by the taxpayer" and forbids the im-

munity when the burden on the state is speculative and uncertain. In the instant case the tax was not passed on to the state. Still further it is said (p. 421): "When immunity is claimed from a tax laid on private persons, it must clearly appear that the burden upon the state function is actual and substantial, not conjectural." In the instant case the tax is levied upon private persons, and it is difficult to see how any state function is burdened.

While none of the rules laid down above was applied to a state of affairs exactly similar to that in the case before us, we think a logical conclusion from the principles laid down by the Supreme Court would exclude plaintiff from the immunity that it seeks to have established.

We need not discuss whether the action of the state involved in the instant case was beneficial to its citizens as we think it is well settled that the mere fact that some benefit is conferred by the state law does not make acts done by another party in connection therewith immune from taxation, or even the acts of the state itself. The argument of plaintiff assumes that the taxation on the transfer of securities by insurance companies in some way burdened or hindered the state in the exercise of its police powers. We do not think this appears from the facts in the case.

There is no doubt that any state of the Union has the right under its police powers to regulate and control the issuance of insurance policies in such a manner as to protect the interests of the policyholders. But in this case, we do not think the statute exercised either regulation or control. It was the insurance company which under the statute determined whether it would or would not register its policies and comply with the provisions of the law. The state exercised no control whatever over the securities deposited until after the insurance company had elected to accept the provisions of the law and proceed under it.

What the state did, as it seems to us, was to grant to the insurance company the privilege of using the state as a depository for its securities for the payment of the policies issued. If the insurance company exercised this privilege it could be used as an inducement to take out policies in the

company making the deposit by reason of the greater security provided. Altogether it seems that the plan was devised rather in the interest of home insurance companies than of the public. But be this as it may, we think the statutory provisions should be taken as a whole and that when so regarded it is clear that they had no force unless put in motion by an insurance company. The tax may be said to have burdened in some slight degree the insurance companies which made use of the state as a depository for securities, but this was not a burden upon the right of the state to control the insurance companies or regulate them, for the statute did not require the insurance companies to make such a deposit. If this was the extent of the burden cast, the statute would not be unconstitutional.

The case of *Ambrosini* v. *United States*, 187 U. S. 1, which plaintiff contends is controlling in its favor, in our opinion has no application. In that case the State of Illinois was exercising its undoubted right under its police powers to regulate the sale of intoxicating liquors and in so doing required a bond to be filed by the applicant for a license to sell such liquors. The Government required a stamp to be placed upon the bond when filed. Unquestionably this placed a burden upon the lawful exercise of the police power of the state. The facts are quite different from those which appear in the instant case.

The rule is familiar that the courts should not declare a statute unconstitutional unless its unconstitutionality is free from doubt. This we cannot say, and therefore hold to the contrary of plaintiff's contention.

The plaintiff's petition must be dismissed, and it is so ordered.

WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

DRAVO CORPORATION, A CORPORATION, v. THE UNITED STATES

[No. 45147. Decided March 3, 1941]

On Demurrer

Government contract; voluntary addition to cofferdam by contractor.—Where it was provided in a contract with the Government for the construction of locks and appurtenant works on the Ohio River that when and if, while the work was in progress, a rise in the Ohio River should "overtop" the cofferdam where built and maintained to the specified elevation of 530.0, which is 18 feet above the normal pool above Dam 27, Ohio River, an allowance of $5,000 would be made to the contractor for every such overtopping of the cofferdam, within certain limitations; and where the contractor of his own volition and without the request or direction either orally or in writing, but with the knowledge and acquiescence of defendant's contracting officer, its officers and employees in charge, added at contractor's own expense and with its materials two feet to the height of the cofferdam, thereby bringing the height of the cofferdam to elevation 532 feet; and where on two occasions during the progress of said work the Ohio River did rise to an elevation in excess of 530 feet at the place where the cofferdam was constructed and maintained but did not on either occasion reach or exceed elevation 532, and said cofferdam was not overtopped or flooded; it is *held* that the petition of plaintiff does not state a cause of action under the proper interpretation of the contract and plaintiff is not entitled to recover.

Same; decision of contracting officer.—Where contract with the Government provided that all disputes concerning questions arising thereunder should be submitted to and decided by the contracting officer or his duly authorized representative, subject to written appeal by the dissatisfied party to the head of the department, whose decision should be final and conclusive; and where plaintiff does not allege that the decision of the contracting officer denying its claim was arbitrary or so grossly erroneous as to imply bad faith; and where the facts alleged in the petition are not sufficient to show that the decisions of the contracting officer and the department head were arbitrary or grossly erroneous; it is *held* that the plaintiff cannot recover.

Mr. Challen B. Ellis for the plaintiff.

Mr. Gaines V. Palmes, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the decision of the court.

LITTLETON, *Judge*, delivered the opinion of the court:

December 21, 1933, The Dravo Contracting Company, a Pennsylvania corporation, entered into a contract with the defendant through the Corps of Engineers of the War Department for the construction of two parallel locks and appurtenant works at the Gallipolis Locks and Dam on the Ohio River, near Gallipolis, Ohio. The contract and specifications, portions of which are hereinafter set forth, are attached to the original petition herein, and are made a part hereof by reference.

December 31, 1936, plaintiff succeeded by operation of law to the entire business, assets and liabilities, including the claim here involved, of The Dravo Contracting Company. No question as to the right of plaintiff to maintain and prosecute this suit is involved and, for convenience, The Dravo Contracting Company and the Dravo Corporation will hereinafter be referred to as "plaintiff."

Plaintiff constructed a cofferdam and the two parallel locks and appurtenant works in strict accordance with the terms of the contract and all modifications thereof, and did and performed all things which it undertook to do and perform, as directed by the officers and employees of the defendant. Art. 1 of the contract provided that "The contractor shall furnish all labor and materials, and perform all work required for constructing two parallel locks, including guide and guard walls, gates and gate operating machinery, valves and valve operating machinery, and piping at the Gallipolis Lock and Dam, Ohio River, near Gallipolis, Ohio, for the consideration of a sum based on designations and unit prices specified in schedule appended hereto in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof * * *." This article further provided as follows:

> The work shall be commenced within ten (10) calendar days after the date of receipt by the contractor of notice to proceed, and shall be completed within 650 calendar days after the date of receipt by the contractor of the aforesaid notice to proceed.

An amount of time equal to that lost as a result of the flooding of cofferdam built to the required height caused by rises in the Ohio River (see par. 9 of specifications) will be allowed in addition to the 650 calendar days specified for the completion of the work, provided it is clearly established that this time is not due to any negligence on the part of the contractor.

Par. 1–02 of Section 1 of the Detail Specifications, made a part of the contract and entitled "Cofferdams, Excavation, Foundations and Fill," provides as follows:

Cofferdam.

(a) The entire work shall be constructed within a cofferdam as indicated on sheet 19/1. The cofferdam shall consist of connected circular cells of interlocked steel sheet piling driven to refusal in rock. The cells shall be filled with suitable material and capped with a 6-inch layer of concrete. The cofferdam shall be built to elevation 530.0 which is 18 feet above the normal pool above Dam No. 27, Ohio River. The base width of the cofferdam shall be at least equal to its height unless equal stability is otherwise provided.

PAR. 9 of the specifications referred to in the last above-quoted provision of Art. 1 of the contract provides as follows:

(a) In the event that work remains to be done and is actually in progress within the cofferdam constructed to the height specified in Section 1, and a rise in the Ohio River overtops the cofferdam where built and maintained to the full height specified in paragraph 1–02, an allowance of $5,000 will be made to the contractor upon full resumption of work within the cofferdam, subject to the following: Only one allowance will be made for a rise, allowances for overtopping of the cofferdam will be made only during the period allowed for completion of the work under paragraph 6 of these specifications, and such extension thereof as may be allowed under Articles 3 and 9 of the contract.

(b) No allowance will be made in case the cofferdam is flooded through failure of the cofferdam. In case the contractor floods the cofferdam during a rise prior to natural flooding due to overtopping the cofferdam, the flooding will be considered grounds for the allowance provided the rise actually overtops the cofferdam where built to the full height specified.

Plaintiff prepared and submitted plans and blue prints to the defendant for a cofferdam showing a height to elevation 530, as required by the specifications, and such plans were approved by the contracting officer. The plaintiff thereupon constructed the cofferdam to elevation 530 as called for by the specifications and in accordance with plans and blue prints submitted to and approved by the contracting officer. In addition to the construction of such cofferdam to elevation 530, the plaintiff of its own volition and without request or direction by the contracting officer, either orally or in writing, but with the knowledge and acquiescence of defendant's officers and employees having charge of the work called for by the contract, added, at its own expense and with its materials, two feet to the height of the cofferdam as called for by the contract and specifications, thereby bringing the height of the cofferdam to elevation 532 feet. This voluntary increase in the contract height of the cofferdam was made by plaintiff as a precaution against flooding of the cofferdam and resulting interference with the work to be constructed and performed therein, in the event the waters of the Ohio River in the pool above the dam should reach a stage above elevation 530 but lower than 532. The petition alleges that "the cost of this extra 2 feet of construction work together with the expense of removal of machinery and other extraordinary outlays caused by floods on the two occasions when the water exceeded 530 feet, but did not exceed 532 feet, was in excess of $10,000.00."

April 8, 1934, while work called for by the contract was actually in progress within the cofferdam, and while other such work remained to be done, a rise in the Ohio River occurred which exceeded elevation 530 at the place where the cofferdam was constructed and maintained, but the rise did not reach elevation 532. During this rise plaintiff discontinued operations but as soon as practicable, and within a day or two thereafter and while there remained work to be done within the cofferdam, plaintiff resumed work. The cofferdam was not overtopped or flooded. On February 28, 1935, while work was actually in progress within the cofferdam and while other such work remained to be done under the contract, another rise in the Ohio River occurred during

which the water in the pool above the dam, on which the cofferdam was constructed, exceeded elevation 530 at the place where the cofferdam had been constructed and was maintained but did not reach an elevation of 532. The water did not overtop the cofferdam and it was not flooded. As soon as practicable, and within a day or two after this rise the waters subsided, and while there remained work to be performed within the cofferdam, the plaintiff fully resumed such work.

At some time subsequent to the two rises in the waters of the Ohio River on April 8, 1934, and February 28, 1935, the exact date not being stated, plaintiff demanded of defendant payment of $10,000 which plaintiff claimed was due it under par. 9 of the specifications because these two rises in the waters of the Ohio River had exceeded elevation 530, thereby "overtopping the specified height of the cofferdam as required to be constructed."

It is further alleged in the petition that this "payment has been refused by the Chief of Engineers, acting for the defendant and said claim has been presented to and disallowed by the Comptroller General of the United States."

The facts set forth above, which are the facts well pleaded in the petition filed in this case, to which the defendant has interposed a demurrer, do not in our opinion state a cause of action entitling plaintiff to recover under the quoted provisions of the contract and specifications upon which the claim is based. Plaintiff does not sue and could not maintain suit to recover extra costs or expense of constructing the cofferdam two additional feet above elevation 530, as specified in the contract and the specifications, for the reason that the material so used and the expense of such work were voluntarily supplied by the contractor without such work and materials being ordered or approved in writing, or otherwise, by the contracting officer.

Art. 5 of the contract provided that "Except as otherwise herein provided, no charge for any extra work or material will be allowed unless the same has been ordered in writing by the contracting officer and the price stated in such order." It is well settled that under such a contract provision no recovery can be had for extra costs of labor and material

unless ordered or specifically approved in such a way as to show a purpose to bind the United States in accordance with the contract to pay therefor. Mere failure to object is not enough. Art. 15 of the contract entitled "*Disputes*" provided that "All labor issues arising under this contract which cannot be satisfactorily adjusted by the contracting officer shall be submitted to the Board of Labor Review. Except as otherwise specifically provided in this contract, all other disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions." Plaintiff does not allege that the decision of the contracting officer denying its claim for $5,000 each for the two rises in the river above elevation 530 was arbitrary or so grossly erroneous as to imply bad faith.

It is not alleged or claimed that the contracting officer ordered in writing or otherwise that the contractor furnish the material and perform the work necessary to add 2 feet to the specified height of the cofferdam. It is alleged in the petition that the plaintiff added two additional feet to the height of the cofferdam with the "knowledge, acquiescence, and approval of the defendant, its officers and employees having charge of the particular work involved," but this general allegation is not sufficient, in view of the provisions of Art. 5 of the contract, to entitle plaintiff to recover anything on account of having incurred any increased expense incident to the construction of the cofferdam or to entitle plaintiff to recover the allowance of $5,000 or more mentioned in par. 9 of the specifications, unless, independently of art. 5, plaintiff is entitled to recover one or more allowances of $5,000 under the terms and provisions of art. 1 of the contract and paragraphs 9 and 1-02 of the specifications. We lay aside therefore, as having no bearing upon the question presented, the fact that the contracting officer may have had knowledge of, acquiesced in, or made no objection to the addition by plaintiff of two feet to the height of the cofferdam. Moreover, the cost of constructing the coffer-

dam was an item of expense to the contractor for furnishing to the Government the completed structure called for by the contract, i. e., the two completed parallel locks at the dam in question. The cofferdam was not a part of the completed structure called for by the contract to be delivered to the defendant in strict accordance with the contract and specifications for its subsequent use. Nor is there any allegation in the petition that the actual cost of the cofferdam as constructed by plaintiff exceeded the amount of the expense therefor included in its bid and in the contract for the cost of constructing the necessary cofferdam. This was a unit price contract and the total estimated contract price, based upon the estimated quantities of each unit of work specified, was $3,145,790, including the lump sum bid and accepted as the maximum sum that would be paid as the total for all necessary cofferdam work.

In any event, we are of opinion that under a proper construction of the contract and specifications, the facts well pleaded in the petition do not entitle plaintiff to recover. Plaintiff bases its right to recover allowances of $5,000 each for the two rises of waters in the Ohio River on April 8, 1934, and February 28, 1935, entirely upon its interpretation of the meaning of the words "overtops" and "overtopping" found in par. 9 of the specifications and insists that the allowance of $5,000 specified in art. 9 of the specifications became due and payable each time that the waters of the Ohio River rose to an elevation in excess of 530 feet even though the cofferdam as constructed was not flooded and the waters of the river did not flow over the top of or into the cofferdam. We cannot concur in plaintiff's construction of the contract and specifications. In construing a contract all its provisions and the surrounding circumstances must be taken into consideration in arriving at the intention of the parties and the correct meanings of the words and phrases used therein.

In *Joice* v. *United States*, 51 C. Cls. 439, 442, 443, this court said:

> In ascertaining the meaning to be ascribed to said phrase we must consider the entire contract, its purposes, the surrounding circumstances, and the facts known to

the parties, with reference to which it may be considered they contracted. We can not take a detached part of a specification or contract and give it a meaning that if standing alone it might receive when upon examining the whole specification and contract and giving proper weight to the other considerations we have mentioned the meaning of the phrase in the particular contract appears to be different from what it might be under the usages of trade.

In *Moran* v. *Prather*, 23 Wall. 492, 501, the court said:

> All the facts and circumstances may be taken into consideration, if the language be doubtful, to enable the court to arrive at the real intention of the parties, and to make a correct application of the words of the contract to the subject-matter and the objects professed to be described, for the law concedes to the court the same light and information that the parties enjoyed, so far as the same can be collected from the language employed, the subject-matter, and the surrounding facts and circumstances.

In *Black et al.* v. *United States*, 91 U. S. 267, 269, the court said:

> For the purposes of construction, we must look to the whole instrument. The intention of the parties is to be ascertained by an examination of all they have said in their agreement, and not of a part only.

In *Merrill-Ruckgaber Company* v. *United States*, 241 U. S. 387, 392, the court said:

> The case is in narrow compass. It involves for its solution the construction of a contract, and the rules to guide such construction we need not rehearse. To its words we at first resort, but not to one or a few of them but to all of them as associated, and as well to the conditions to which they were addressed and intended to provide for. The argument of appellant ignores this rule. As we shall see, it makes one word dominant, controls all others by it, and puts out of view the demands of the physical conditions.

See also *Merriam* v. *United States*, 107 U. S. 437, 441.

Applying these rules to the language used in art. 1 of the contract and paragraphs 1–02 and 9 of the specifications, we think the intention of the parties as expressed in the contract

with respect to the conditions under which the allowance of $5,000 for a rise in the Ohio River would be made becomes clear. It thus seems evident from a consideration of all the pertinent language of the contract and specifications that provision was being made for payment of the allowance of $5,000 mentioned in par. 9 of the specifications only in case the cofferdam was actually overtopped and flooded by a rise in the river. It is perfectly obvious from the language of the contract and specifications that if the cofferdam, constructed as specified in par. 1–02 of the specifications mentioned in art. 9, was overtopped by a rise in the waters of the Ohio River, such cofferdam would be flooded as art. 1 of the contract and the title of par. 9 of the specifications clearly stated. It was on that basis and on that condition alone that it was stipulated that an allowance of $5,000 would be made upon full resumption of work within the cofferdam. It is also perfectly clear from a reading of the contract and specifications that it was not contemplated by either party when the contract was executed that the cofferdam would be constructed to an elevation in excess of 530 feet unless so ordered by the defendant under art. 3, or that any other means might be provided to prevent the water from flowing into and flooding the cofferdam and still leave a contractor entitled to the allowance of $5,000 for each rise in the waters of the Ohio River above elevation 530. The stipulated allowance was not merely for a rise in the river. Par. 9 of the specifications, in which the allowance of $5,000 is provided, is entitled "Flooding of Cofferdams," and in par. (b) reference is made "to natural flooding due to overtopping the cofferdam." These and other statements in the contract and specifications, and the possible event concerning which the parties were making provision, show, we think, that the parties used the words "overtops" and "overtopping" as meaning and having reference solely to the matter of overflowing or flooding of the cofferdam. The subject matter which constituted the basis for the allowance of $5,000 mentioned in the specifications was clearly, we think, the "flooding of the cofferdams", and since the cofferdam in the case at bar was not flooded by any rise in the Ohio River which over-

topped it there is no authority in the contract provisions for the recovery of $5,000 for each of the two rises in the river. This conclusion is consistent with the definition given in Webster's New International Dictionary of the word "overtopped" as follows: (1) to rise above the top of; to exceed in height; to tower above. (2) to go beyond; to transcend; to override. * * * (5) to cover, flow over, or to cast shade over the top of."

When this definition is applied in the light of the other language of the quoted provisions of art. 1 of the contract and art. 9 of the specifications, it becomes clear that the words "overtops" and "overtopping" were intended to have reference to the overflowing and flooding of the cofferdam as a result of a rise in the Ohio River and that the payment of the stated allowance of $5,000 was conditioned upon the cofferdam being flooded as a result of the rise of the waters of the Ohio River. If the contract had intended that an allowance of $5,000 would be made to plaintiff each time the waters of the Ohio River in the pool above Dam #27 rose above elevation 530, which is in substance and effect what plaintiff here contends and is the theory upon which the suit is based, we think that right of plaintiff would have been stated in the contract and specifications in clear and simple language. There would certainly have been no occasion for repeated references in the contract and specifications to "flooding of cofferdams."

In addition to our conclusion that the petition does not state a cause of action under the proper interpretation of the contract for the reasons hereinbefore stated, we are of opinion that art. 15 of the contract precludes recovery upon the facts alleged in the petition. Art. 15 provided that all disputes concerning questions arising under this contract shall be decided by the contracting officer or his duly authorized representative, subject to written appeal by the contractor within 30 days to the head of the department concerned or his duly authorized representative, whose decision shall be final and conclusive upon the parties thereto as to such questions. Whether plaintiff was entitled to demand and to receive the two allowances of $5,000 each, under par. 9 of the specifica-

tions, under the existing facts, conditions, and circumstances resulted in a dispute between the parties concerning a question arising under the contract. In view of the clear language of art. 15, the decisions of the contracting officer and the head of the department against plaintiff on this question were final and conclusive, unless those decisions were arbitrary or so grossly erroneous upon the facts before them as to imply bad faith. *Plumley* v. *United States*, 226 U. S. 545, 547; *Merrill-Ruckgaber Co.* v. *United States*, 241 U. S. 387, 393; *Ripley* v. *United States*, 223 U. S. 695, 701; *United States* v. *John McShain, Inc.*, 308 U. S. 520, 521. The facts alleged in the petition are not sufficient to show that the decisions of these officers were arbitrary or grossly erroneous.

The demurrer is sustained and the petition is dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, concurring:

I concur in the result, because of the provisions of article 15 of the contract conferring jurisdiction on the defendant's contracting officer to settle all disputes and making his decision "final and conclusive." Although it is surprizing that they should do so, it is nevertheless within the power of parties to agree to leave to one of them the settlement of any disputes under the contract if they choose. This is what the parties did in this case, and they are bound by it. The contracting officer has interpreted the word "overtops" to mean flooding. I think that interpretation wrong, but under the contract this court is without power to substitute its construction for that of the so-called arbiter agreed on by the parties.

I think the plaintiff is entitled to recover except for this provision.

SAMUEL J. KATZBERG, LOUIS HAIG, AND JACOB F. SCHMITT v. THE UNITED STATES

[No. 45289. Decided March 3, 1941]

On Demurrer

Internal Revenue; offer of reward for information leading to conviction.—Following the decision in the case of *Abraham L. Gordon* v. *United States*, 92 C. Cls. 499, it is *held* that under the provisions of the offer of reward made by the Commissioner of Internal Revenue, the amount of the award is within the discretion of the Commissioner.

Same.—Where no definite or ascertainable sum was offered, no contract arose from the offer of reward and the giving of information by the plaintiffs.

Mr. David Steckler for the plaintiffs. *Mr. Frank D. Chaiken* was on the briefs.

Mr. E. Leo Backus, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for defendant.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This case is before us on demurrer to plaintiffs' petition. The petition alleges the plaintiffs gave certain information to the Commissioner of Internal Revenue concerning violation of the revenue laws, which led to the detection and punishment of persons guilty of violating the internal revenue laws and the recovery of fines, penalties, forfeitures and taxes; that a claim for reward was filed pursuant to the Commissioner's offer of reward, and that this reward was rejected by the Commissioner; and that in so doing he acted arbitrarily and capriciously.

The Commissioner's offer of reward reads in part as follows:

> * * * I do hereby, with the approval of the Secretary of the Treasury, offer for information given by persons other than officers of internal revenue, * * * that shall lead to the detection and punishment of persons guilty of violating the internal revenue laws, * * *

such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding 10 percent of the net amount of fines, penalties, forfeitures, and taxes, which by reason of said information shall be recovered by suit or otherwise. * * *

This case is ruled by our decision in *Abraham L. Gordon* v. *United States*, 92 C. Cls. 499. The plaintiffs say this case should be overruled. They say the offer of reward in both cases implies that the Commissioner will give honest consideration to the claim of reward, and that the petition alleges he did not do this, but acted arbitrarily and capriciously, which the demurrer admits. To this extent we agree.

But we cannot agree that the offer also implies, as the plaintiffs say, that the Commissioner shall award such sum as may be reasonable in fact. The offer says he will award such sum as shall seem *to him* suitable, not such sum as may in fact be suitable, or reasonable. What this sum is we have no way of knowing. No definite or ascertainable sum was offered and, therefore, no contract arose from the offer of reward and the giving of information by the plaintiffs. In these circumstances this case is controlled by the *Gordon* decision, to which we adhere.

Defendant's demurrer must be sustained, and plaintiffs' petition dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MYERS ARMS CORPORATION, A CORPORATION, v. THE UNITED STATES

[No. M-231. Decided April 7, 1941]

On the Proofs

Patent for rotatable gun mount; validity; infringement.—It is held that if the patent in suit, No. 1,608,109, issued November 23, 1926, which "relates to vehicles and particularly to that class thereof that are used in warfare," is read so as to apply to the Scarff gun mount used in aeroplanes purchased by the defendant for the Army, there is no infringement since it was anticipated by prior patents and designs and is therefore invalid.

Same.—It is *held* that if patent No. 1,608,109 is not read so as to apply to the Scarff gun mount and is confined to the specific embodiments disclosed in the said patent No. 1,608,109, there was no infringement, since the Scarff mount was an altogether different structure from that disclosed by the patent in suit.

Same.—The concept of a gun mounted in an aeroplane in the same general manner as the gun in the patent in suit was not new when the application for said patent was made.

Same.—There is no patentable relation between a flying machine and a cannon carried thereby.

The Reporter's statement of the case:

Mr. Charles R. Fenwick for the plaintiff. *Messrs. William H. Mondell* and *Hugh H. Obear* were on the briefs.

Mr. H. L. Godfrey, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. J. F. Mothershead* and *Frank H. Harmon* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, Myers Arms Corporation, is a corporation organized and existing under and by virtue of the laws of the State of New York, with offices at 331 Madison Avenue, New York, N. Y.

2. Under date of June 12, 1931, George Francis Myers executed an instrument in writing assigning to the Myers Arms Corporation the exclusive right, title, and interest in and to the patent in suit including the right of action and recovery for past infringement.

The original instrument, which was not recorded in the United States Patent Office, is plaintiff's exhibit 2, and is by reference made a part of this finding.

3. On August 23, 1909, George Francis Myers filed an application for a patent in the United States Patent Office, Serial #514,165, for improvements in flying machines. One of the objects stated was "to improve the means for supporting and operating a cannon."

The original application contains the following disclosure relative to the mounting of a gun or cannon on an aeroplane:

> For use in warfare the flying machine is provided with a cannon 800 which is preferably arranged above the body or frame in rear of the stabilizer and mounted on the frame by the means which are shown in figures

1, 2, 26, 27, and 28 and which are constructed as follows:

80 represents a circular track arranged horizontally on the bottom of the turret or gunner's compartment in the frame or body and surrounding an opening of substantially the same diameter in the bottom of the body. The gunner's compartment or turret is preferably made square in cross section, as shown in figure 27, by extending the sides of the body for this purpose. Within the gunner's compartment and projecting upwardly through an opening in the top of this compartment is a horizontally rotatable carriage 81 which has an unobstructed interior and which preferably comprises a lower circular base or ring 82 provided with wheels 83 running on the track 80 and a pair of standards 84 which project upwardly from opposite sides of the base through the top opening of the gunner's compartment and to the upper ends of which above the main frame or body the cannon is pivoted by means of horizontal trunnions 85. By turning the carriage horizontally in the frame and the cannon vertically on the carriage it is possible for the gunner to aim the cannon in all directions within a hemisphere above the frame or body of the machine and also downwardly through the body into different parts of a conical field, thereby commanding practically the entire space around the flying machine and affording the maximum capacity for attack or defense.

The carriage is provided with a seat 86 for the gunner whereby the latter is supported by the carriage and remains in a definite location relative to the cannon as the carriage is rotated.

Figures 1 to 5, inclusive, of the patent in suit which comprise all the drawings thereof are similar in character to Figures 12, 26, 27, and 28 of the drawings of the original application, and the structures disclosed in the drawings of the patent in suit are based upon the drawings of the original application.

4. Claims 29 to 34 of the original application refer to the combination of a flying machine and a cannon. Claims 29 and 34, which are typical of this group, are as follows:

29. A flying machine comprising a body having a gunner's compartment provided with an opening to the exterior of the body, a carriage rotatable within said compartment and projecting through said opening, and a cannon mounted on the carriage outside of said body.

34. A flying machine comprising a body having a gunner's compartment provided with an opening to the exterior of the body, a carriage rotatable within said compartment and projecting through said opening, a cannon mounted on the carriage outside of said body, and a gunner's seat arranged on said carriage.

On December 7, 1909, the Examiner in the Patent Office rejected claims 29 to 34 in the following language:

> Claims 29–34 inclusive, are rejected for lack of combination. There is no patentable relation between a flying machine and a cannon carried thereby. If applicant has made improvements in a mount for a cannon, he should embody his claims thereto in a separate application which would properly be classified in the class of ordinance [*sic*].

On November 21, 1910, claims 29 to 34 were cancelled by the patentee without comment and no claims referring to the gun or gun mount were thereafter contained in this original patent application.

A copy of the file wrapper and contents, defendant's exhibit 22, and a copy of the drawings of the original Myers application, defendant's exhibit 22a, are by reference made a part of this finding.

5. Under date of December 1, 1916, the patentee, Myers, filed application Serial No. 134550 in the United States Patent Office as a divisional application of the original application referred to in findings 3 and 4, *supra*.

As filed, the divisional application stated as follows, with respect to the objects of the invention:

> This invention relates to vehicles, and particularly to that class thereof that are used in warfare.
>
> It consists of a gun or cannon that can be turned in any direction on a vehicle.
>
> It further consists in improved means for supporting and operating the gun or cannon.

Claim 1 as filed read as follows:

> A vehicle comprising an elongated box-shaped body with tapering ends, means for driving and steering the vehicle, a turn table in the said body, a carriage mounted on the said table, and a cannon mounted on the said table.

Under date of November 23, 1926, this divisional application matured into the patent in suit No. 1,608,109.

A copy of the file wrapper, contents and original drawings, defendant's exhibit 23, and a copy of the references cited during the prosecution of this application, defendant's exhibits 26–A to 26–II, and defendant's exhibits 27–A to 27–T, are by reference made a part of this finding.

6. There is no evidence to establish a date of conception prior to August 23, 1909, the filing date of the original application of which the patent in suit is a division.

7. The title of the patent in suit is "Vehicle," the text of the specification stating that the invention relates to vehicles, and particularly to the class thereof that is used in warfare.

The patent states the object of the invention in the following phraseology:

> The object of the invention is to transport heavy bodies through the air, especially guns, cannon or other instruments of destruction.
>
> It consists of a gun or cannon or other instrument of destruction that can be turned in any direction on the vehicle.
>
> It further consists in improved means for supporting and operating the gun or cannon or other instrument of destruction. It also consists in certain novel features, which will now be described and then particularly pointed out in the claims.

The specification further indicates that the concept of the invention disclosed therein is not limited solely to aeronautical vehicles but contemplates as well a vehicle adapted to travel over the surface of the ground.

The following quoted phraseology is indicative:

> The vehicle is constructed and operated substantially and preferably as follows, it being understood that the same may be used as an aeronautical vehicle, or as a vehicle adapted to travel at speed over the surface of the earth in which case the aeroplanes take off more or less of the weight of the machine from the earth-engaging means.

A copy of the patent in suit, plaintiff's exhibit 1, is by reference made a part of this finding.

8. The specific embodiment disclosed and illustrated in the patent in suit comprises a vehicle having an elongated

fuselage or body with wheels and which is provided with three sets each of five superposed wings (termed aeroplanes in the specification) arranged in tandem, which sets are positioned at the front, adjacent the tail surface and at the center of the fuselage.

The multiple propellers and the driving motor are located between the front and rear sets of wings. The pilot's compartment or cockpit is located between the front and the middle sets of wings.

Between the center and rear sets of wings there is provided a gunner's compartment or cockpit, the same being sufficiently large to receive not only the gunner but the gun mounting.

Figures 3, 4, and 5 of the patent in suit are reproduced in the findings and are illustrative of the details of this compartment and the gun mounting. As shown in these drawings and described in the patent, the gun mount comprises an annular carriage 82 rotatable through 350 degrees about its central axis, the same being provided with a series of rollers or wheels 83 running on a circular track 80. The annular carriage supports a tripod-like frame which in turn supports at its upper end a gun or cannon 800 mounted in trunnions so as to be capable of adjustment through a vertical arc.

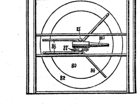
As shown, the gun is provided with a sighting telescope and also with a periscope which is indicated as being useful when firing in a vertical position.

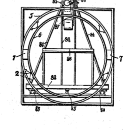
The tripod-like frame is provided with a gunner's seat at 86 so that as the carriage and frame are rotated the gunner moves bodily in a circumferential path within the cockpit and therefore remains seated in a convenient operating position behind the breech of the gun at all times.

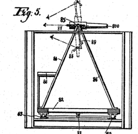
An opening is provided in the bottom of the cockpit and in the rotating platform so that if desired the gun muzzle may be depressed and obtain a downward cone of fire limited or designated by the extent of the area or opening in the bottom of the cockpit.

9. The disclosure relating to the gun carriage and including figures 3, 4, and 5 of the drawings which are merely diagrammatic in character and not working or shop drawings, does not contain certain detail features which would make the Myers device practicable.









Figures 3, 4, and 5 of the Patent in suit #1,608,109.

As disclosed, there is nothing to prevent the annular carriage from leaving the circular track in the bottom of the cockpit should the aeroplane strike an air pocket or undergo a severe angular inclination. There is also no means for locking the annular gun carriage against undesired rotative movement around the track.

It is, however, within the knowledge of an ordinary mechanic to construct a track with a conventional overhanging flange and to provide a conventional ratchet and pawl, or a brake to lock the annular carriage in any desired position, and the disclosure is directed to an operative construction within the meaning of the patent statutes.

10. The claims in issue in the patent in suit are claims 1, 2, 3, 4, 10, 11, and 12. The phraseology of all these claims is directed to an aeroplane structure in combination with a gun and gun carriage.

In order to more easily consider the structure defined by the claims, the elements and phraseology relating to the gun and gun carriage structure, *per se*, have been italicized and the claims have been paraphrased as indicated in the quoted claims below:

Claim 1

(a) In a flying machine of the heavier than air type, the combination of a body elongated in form and extending in the direction of travel, an aeroplane supporting surface transversely disposed with reference to the main body and projecting laterally therebeyond,

(b) said main body having a cockpit longitudinally removed from said transverse aeroplane,

(c) *a platform carried by said main body and disposed within said cockpit,*

(d) *a gun carriage adjustable in a horizontal plane about said platform,*

(e) *a gun mounted on said carriage which is capable of adjustment in the vertical planes for firing in the upward direction,*

(f) means for propelling and directing the movements of said aircraft and the gun, whereby the craft may be driven to the point desired and the gun may be fired unobstructedly in the upward direction unhindered by the sustaining, propelling and controlling means of the craft.

Claim 2

(a) In a flying machine of the heavier-than-air type, the combination of a body elongated in form and extending in the direction of travel, an aeroplane supporting surface transversely disposed with reference to the main body and projecting laterally therebeyond.

(b) said main body having a cockpit at a point longitudinally removed from said transverse aeroplane,

(c) *a platform carried by said body and disposed within the cockpit,*

(d) *a carriage mounted on said platform which is capable of adjustments in the horizontal plane,*

(e) *a gun borne by said carriage at a point elevated substantially on a level with the upper part of said main body,*

(f) *said gun being capable of adjustment in the vertical planes for fire in upward directions,*

(g) means for propelling and directing the movements of said craft, whereby the craft may be propelled and directed to the point desired and the gun may be fired unobstructedly in the upper direction unhindered by the sustaining, propelling and controlling means.

Claim 3

(a) In a flying machine of the heavier-than-air type, the combination of a body elongated in form and extending in the direction of travel, an aeroplane supporting surface transversely disposed with reference to the main body and projecting laterally therebeyond, said aeroplane being disposed slightly above the level of the main body upper surface and—

(b) Said main body having a cockpit at a point longitudinally removed from said transverse aeroplane, said cockpit being large enough to accommodate the mounting of a gun and an operator,

(c) *a circular runway carried by said main body and disposed about the cockpit,*

(d) *a gun carriage mounted on the circular ring and capable of adjustments in the horizontal plane,*

(e) *a gun borne by said carriage at a point elevated substantially on a level with the upper part of said main body, said gun being capable of adjustments in the vertical planes for fire in upward directions,*

(f) means for propelling and directing the movements of said craft, whereby the craft may be propelled

and directed to the point desired and the gun may be fired unobstructedly in the upper direction unhindered by the sustaining, propelling and controlling means.

Claim 4

(a) In a flying machine of the heavier than air type, the combination of a body elongated in form and extending in the direction of travel, an aeroplane supporting surface transversely disposed with reference to the main body and projecting laterally therebeyond,

(b) Said main body having a cockpit longitudinally removed from said transverse aeroplane,

(c) *a circular platform carried by said main body within the cockpit and disposed below the level of the upper surface of the main body,*

(d) *a gun carriage adjustable in a horizontal plane about said platform, and adapted to carry a gun support slightly above the level of the upper surface of the main body,*

(e) *a gun mounted on said support which is capable of adjustment in the vertical planes for firing in the upward direction,*

(f) means for propelling and directing the movements of said aircraft and the gun, whereby the craft may be driven to the point desired and the gun may be fired unobstructedly in the upward direction unhindered by the sustaining, propelling and controlling means of the craft.

Claim 10

(a) In a flying machine of the heavier-than-air type, the combination of an inclosed body elongated in form and extending in the direction of travel, a sustaining device transversely disposed with relation to the said body and projecting therebeyond,

(b) said body having an opening therein or cockpit,

(c) *a platform or circular track carried by the said body and disposed about the said opening,*

(d) *a gun carriage adjustable in a horizontal plane about the said platform, trunnion means mounted on the said carraige,*

(e) *a gun mounted on the said trunnion means which is capable of adjustment in the vertical direction,*

(f) *the said platform, carriage, trunnion means and the said gun when in its position for firing in the vertical direction being encompassed by the projection of the outer wall or sides of the said cockpit,*

(g) and means for propelling and directing the movements of the machine and the said gun whereby the machine may be driven to the point desired and the gun fired unobstructedly in the upward direction unhindered by the sustaining, propelling and controlling means of the machine.

Claim 11

(a) In a flying machine of the heavier-than-air type, the combination of an inclosed body elongated in form and extending in the direction of travel, a sustaining device transversely disposed with relation to the said body and projecting therebeyond,

(b) said body having an opening or cockpit therein,

(c) *a platform or circular track carried by the said body and disposed about the said opening,*

(d) *a gun carriage adjustable in a horizontal plane about the said platform, trunnion means projecting from the said carriage,*

(e) *a gun mounted on the said trunnion means and which is capable of adjustment in the vertical direction, and when trained upwardly perpendicularly to the longitudinal center line of the said body is so mounted as to project below the top of the same,*

(f) and means for propelling and directing the movements of the machine and the said gun whereby the machine may be driven to the point desired and the gun fired unobstructedly in the upward direction unhindered by the sustaining, propelling and controlling means of the machine.

Claim 12

(a) In a flying machine of the heavier than air type, the combination of an inclosed body elongated in form and extending in the direction of travel, a sustaining device transversely disposed with relation to the said body and projecting therebeyond,

(b) said body having an opening or cockpit therein,

(c) *a platform or circular track carried by the said body and disposed about the said opening,*

(d) *a gun carriage adjustable in the horizontal plane about the said platform, trunnion means mounted on the said carriage and movable therewith,*

(e) *a gun mounted on the said trunnion means and which is capable of adjustment in the vertical direction and when fired perpendicularly is enclosed in part within the said cockpit,*

(f) and means for propelling and directing the movements of the machine and the said gun whereby the machine may be driven to the point desired and the gun fired unobstructedly in the upward direction unhindered by the sustaining, propelling and controlling means of the machine.

11. Using the specification of the patent in suit as a dictionary by which to interpret the meaning of words or phrases used in the claims, it is found in lines 62 to 64, page 2 of the specification, that the term "platform" as used in the claims is synonymous with the circular track 80 upon which the gun carriage is rotatable.

The part of the specification referred to reads as follows:

> 80 represents a platform or circular track arranged horizontally in the turret or gunner's compartment in the frame or body.

ALLEGED INFRINGING STRUCTURES

12. The charge of infringement in this case is predicated on two different types of structure. The first is known as the Scarff Gun Mount and in the present case it is exemplified by a Scarff mount upon a DeHavilland-4 aeroplane. This structure is illustrated in plaintiff's exhibits 11, 12, 15, 17, 17-A to 17-N, 18, 19-A and 20-A, and defendant's exhibits 3-1 to 3-6, inclusive.

The claims in issue as to this type of mount are 3, 10, 11, and 12.

The second type of gun mount construction is known as the Navy 3-A and 3-B Mounts and is illustrated in plaintiff's exhibits 21, 21-A, 22, 22-A, defendant's exhibits 17 and plaintiff's exhibit 21-B.

The claims in the patent in suit in issue as to this second type of mount are 1, 2, 3, 4, 10, 11, and 12.

The above enumerated exhibits are by reference made a part of this finding.

13. The Scarff gun mount on a DeHavilland-4 aeroplane which has been used as an exemplification of the alleged infringing structure is now located in the Smithsonian Institution, Washington, D. C., and was received therein on April 8, 1919, and has been thereafter on public exhibition.

The particular Scarff gun mount on the aforesaid DeHavilland-4 aeroplane was purchased by the United States from the Wolverine Brass Works, Grand Rapids, Michigan, under S. C. Order dated November 5, 1917, paid for at that time, and installed on this aeroplane as of May 14, 1918.

The aforesaid aeroplane was constructed by the Dayton-Wright Co., Dayton, Ohio, for the United States Government and delivered and paid for in the latter part of 1917.

14. DeHavilland-4 aeroplanes with Scarff gun mounts and gun constructed as shown in plaintiff's exhibits 11, 12, 15, 17, 17-A to 17-N, 18, 19-A, and 20-A, and defendant's exhibits 3-1 to 3-6, were purchased, paid for, and delivered to the United States Government by private manufacturers in the United States to the extent of 155 by the week of May 25, 1918. Of this number, 106 were then in use in the United States and 49 were then in France in use by the United States Expeditionary Force.

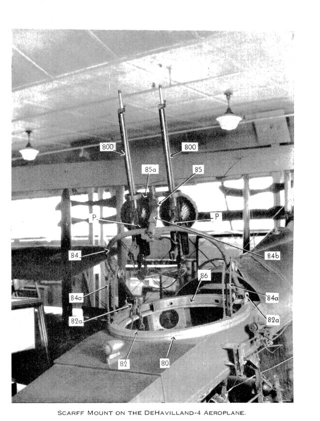
Subsequent to November 23, 1926, the issue date of the patent in suit, and prior to July 20, 1931, the date of the petition in this case, the United States Army has operated planes equipped with the Scarff gun mount.

There is no satisfactory evidence that any Scarff gun mounts were manufactured for or by the Government during this period.

15. The Scarff mount referred to in finding 13 is illustrated in the photograph of the same reproduced herewith, which photograph forms the basis of plaintiff's exhibit 19-A.

For the purpose of convenient comparison of similar parts in this photograph with the patent in suit, they are referred to by the same reference numerals so far as is possible.

The construction of the Scarff mount here shown comprises a base ring or circular track 80 rigidly secured on the top surface of the fuselage or body and spaced outwardly from the edge of the cockpit about two inches. The annular movable ring 82 is concentrically mounted to rotate on the stationary ring 80, both of the rings being of a greater diameter than the cockpit.



SCARFF MOUNT ON THE DEHAVILLAND-4 AEROPLANE.



The movable ring 82 of the Scarff mount is provided with a pair of spaced upstanding lugs 82a in which a hinged bow 84 is mounted. A pair of similarly spaced upstanding notched quadrants 84a is adapted to support the bow through a series of locked positions from the horizontal upwardly to about 55°. A handle convenient to the gunner controls locking mechanism for simultaneously locking the bow into any of its positions with respect to the quadrants and the movable ring 82 at any desired rotative position with respect to the fixed ring or track 80.

The center of the hinged bow 84 is provided with a socket which is adapted to receive the lower end of a gooseneck member 84b, the upper end of which is provided with a pivot or trunnion pin 85 which in turn carries a mounting piece 85a upon which two machine guns 800 are fixed, the pivot pin thus permitting elevation or depression of the guns independently of the bow 84.

The goose-neck also provides for a limited rotative longitudinal movement of the guns relative to the bow.

16. Various positions of the guns and their associated mountings are shown in photographs, plaintiff's exhibits 19–A, 20–A, and defendant's exhibits 3–1 to 3–6, inclusive.

When the bow is substantially horizontal the gun pivot is positioned outside and beyond the two rings, thus facilitating the firing of the gun downwardly over the outer side of the fuselage.

The bow is substantially counterbalanced, and the raising of the same, and hence the gun pivot, increases the permissible range of fire with respect to the aeroplane and enables the gunner to increase the maximum range of fire without substantial changes in his position. The gunner may rotate the movable ring 82 with respect to the fixed ring 80 by means of the pressure of the lower rear extremity of his body against a backrest 86.

During operation of the guns the gunner is positioned inside the two rings with his feet on the floor of the cockpit.

17. When the bow is elevated into the topmost notch of the quadrants, the guns of the Scarff mount may be elevated upwardly to about 85 degrees from the longitudinal center line of the aeroplane. From this angle of 85 de-

grees up to an exact perpendicular elevation (90 degrees) from the longitudinal center line of the aeroplane, the gear casing P on the guns engages the bow and while the guns therefore by forcing or springing may be pointed at 90 degrees, or mathematically perpendicular to the longitudinal center line of the aeroplane, from 85 degrees to 90 degrees, flexibility and movement of the guns relative to the bow cease, and they cannot be aimed and the gun mount is not intended to be used in combat while the guns are thus locked to the bow in non-aiming position.

The guns when trained upwardly to 85 degrees, which is substantially perpendicular to the longitudinal center line of the aëroplane, do not in any way project below the top of the body of the aeroplane nor is any part of the guns, when set in a substantial perpendicular position, enclosed within the cockpit. Instead, the lower ends of the guns are positioned a substantial distance above the body of the aeroplane and above the cockpit.

When the bow is adjusted into the lower notches the guns may be said to be mounted at a point substantially on a level with the upper part of the aeroplane. See defendant's exhibits 3–4, 3–5, and 3–6.

18. When not limited to the specific embodiment disclosed and illustrated in the patent in suit in which the circular track and annular ring are located in the bottom of the cockpit and about an opening in the bottom thereof, the phraseology of claims 3 and 10 is applicable to the Scarff mount.

19. Claim 11, after defining the aeroplane as a "*body* having an opening or cockpit therein," defines the mounting of the gun in the following phraseology:

> *A gun mounted on the said trunnion means and which is capable of adjustment in the vertical direction, and when trained upwardly perpendicularly to the longitudinal center line of the said body is so mounted as to project below the top of the same.*

While 85 degrees may be considered substantially perpendicular and the phrase of "*trained upwardly perpendicularly to the longitudinal center line of the said body*" is applicable, the guns of the Scarff mount are not so mounted

as to project below the top of the cockpit, and the terminology of this claim is therefore not applicable to the Scarff mount.

20. Claim 12, of the patent in suit, defines the gun mount in the following phraseology:

> *A gun mounted on the said trunnion means and which is capable of adjustment in the vertical direction and when fired perpendicularly is enclosed in part within the said cockpit.*

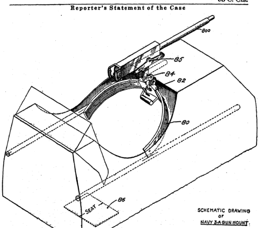
When the guns of the Scarff mount are in the 85-degree position or even forced into the 90-degree position and locked to the bow, no part of them is enclosed within the cockpit. The phraseology of this claim is not applicable to the Scarff mount.

21. The Navy 3-A and 3-B gun mounts were used in connection with a Curtiss aeroplane, and are shown in plaintiff's exhibits 21, 21-A, 21-B, 22 and 22-A, and defendant's exhibit 17. These gun mounts were first installed on a Navy aeroplane January 1, 1931, and there is no satisfactory evidence that their use was other than for the purposes of experimenting with these types of gun mounts.

22. The Navy 3-A gun mount is best illustrated in plaintiff's exhibit 21-B which is reproduced in the findings. For the purpose of convenient comparison with the patent in suit, similar elements in this schematic drawing, referred to above, are designated by the same reference numerals used in the patent in suit.

The Curtiss aeroplane on which this type of gun mount was used is of the double cockpit type with a set of controls in each cockpit for piloting the aeroplane. The gun mount is located in the rear cockpit and, as shown in the following schematic drawing, comprises a semicircular rail or track 80 which is positioned around the rear portion of the top edge of the cockpit and slightly below the same. This semicircular track is not horizontal but is inclined upwardly and to the rear at an angle of 30 degrees.

A gun carriage 82 is so mounted on rollers as to embrace the semicircular track 80, being thus interlocked to the inclined track and capable of movement along the same, a handle



being provided for such movement. A detent lock is provided near the handle, which is adapted to engage a plurality of holes in the semicircular track, thus providing means for locking the gun carriage in any of a plurality of positions relative to the inclined track.

The gun carriage 82 is provided with a goose-neck member 84 which is pivotally mounted therein, the goose-neck member carrying at its upper end trunnion mountings 85 for a machine gun 800. The gun is thus capable of both train and elevational movement with respect to the gun carriage 82 in any of its positions relative to the inclined track 80.

The maximum elevation of which the gun is capable is 77 degrees from the horizontal as shown in defendant's exhibit 17. When in this maximum elevated position it would be difficult, if not impossible, for the gunner to get under the gun to look through the sights; the gunner

in his operation of the gun either remains seated on a fixed seat 86 or may stand on the same to depress the muzzle of the gun over the sides of the cockpit.

23. The 3–A gun mount and the 3–B gun mount are substantially identical in construction and operation, the 3–B gun mount differing only in that the forward ends of the circular track are slightly extended in a straight line along the edge of the cockpit so that the track is of a more pronounced U-shape with the ends thereof curved out of the plane of the main curved portion of the track which is inclined at 30 degrees to the horizontal.

24. All the claims in issue with respect to the Navy 3–A and 3–B gun mounts, viz., 1, 2, 3, 4, 10, 11, and 12, carry the express limitations in item (d) (see finding 10) that the gun carriage is adjustable *in a horizontal plane.* This defining clause with reference to the invention in suit is not applicable to the Navy 3–A and 3–B gun mounts, in which the track or platform extending about the cockpit of the aeroplane is inclined at an angle of 30 degrees and the phraseology of the above-enumerated claims is, therefore, not applicable to the Navy 3–A and 3–B gun mounts.

PRIOR ART AND KNOWLEDGE

25. Prior to August 23, 1909, the filing date of the original Myers application of which the patent in suit is a division, there were available to the public the following patents and publications:

Patents

United States, Gruson, 367,617, Oct. 2, 1887 (Deft's ex. 6).

United States, Canet, 410,968, Sept. 10, 1889 (Deft's ex. 8).

United States, Spiller, 480,215, Aug. 2, 1892 (Deft's ex. 9).

United States, Anderson, 422,003, Feb. 25, 1890 (Deft's ex. 10).

United States, McClean, 749,214, Jan. 12, 1904 (Deft's ex. 15).

Great Britain, Simms, 7,387, 1899 (accepted) (Deft's ex. 7).

France, Voisin, 394,438 1908 (délivré) (Deft's ex. 14).

Textbook of Ordnance and Gunnery, by R. R. Ingersoll, published 1894, page 122, and Plate 18 (defendant's exhibits 19 and 19–A).

Description of Modern Gun Mounts in the United States Navy, published 1894, page 13, and Plate 12 (defendant's exhibit 18).

Textbook of Ordnance and Gunnery, by R. R. Ingersoll, published 1899, pages 184 and 185, and Plate 11 (defendant's exhibit 2).

Black and White, published in Great Britain November 28, 1903, page 793 (defendant's exhibit 11).

The Pall Mall Magazine, published in Great Britain August 1908, pages 144 and 145, and accompanying drawing (defendant's exhibit 12).

United States patent to Voller, #1,041,384 (defendant's exhibit 16), was issued October 15, 1912, on an application filed May 3, 1909, and prior to the filing date of the original Myers application.

None of the above art was cited by the Patent Office or considered by the Examiner during the prosecution of the Myers application maturing into the patent in suit with the exception of the French patent to Voisin, #394,438 (defendant's exhibit 14).

Copies of the foregoing patents and publications, together with a translation of the French patent to Voisin (defendant's exhibit 14–A), are by reference made a part of this finding.

26. French patent to Voisin, #394,438 (defendant's exhibit 14), discloses a flying machine of the heavier-than-air type. As disclosed the same comprises an elongated body or fuselage extending in the direction of travel with a plurality of wings or supporting surfaces located both at the forward end and at the rearward end transversely disposed with respect to the body or fuselage and projecting laterally therebeyond. The drawings show some of the transverse surfaces disposed slightly above the body of the main surface.

The fuselage or body of the aeroplane is provided with a cockpit longitudinally removed from the transverse sustaining surfaces and located between the forward sustaining sur-

faces and the rearward sustaining surfaces. The cockpit is elongated or oval in character and is provided with an upper rim substantially flush with the top of the fuselage.

The aeroplane is provided with means for propelling the same comprising an engine and a tractor propeller and also means for directing the movements of the aircraft which includes control surfaces and operating mechanism therefor located in the cockpit.

27. United States patent to Voller, #1,014,384 (defendant's exhibit 16), is directed to the concept of a gun mounted in an aeroplane, the specification specifically indicating that the gun mount therein disclosed is for use on airships, motorcars, or the like. This patent, as is shown in Figure 1 reproduced herewith, discloses a gun mounting having a set of trunnions in which a gun is mounted for adjustment in a vertical plane, the rotation of the trunnion bracket being provided for by means of a movable circular ring rotating on ball bearings which rotates on the rim of a second fixed circular race or track placed at the top of the conical portion of a fixed base. The gun may therefore be trained horizontally to any desired position and may be also adjusted through a large elevational angle on its trunnions.

It is entirely obvious that when the Voller gun and mount are located in the cockpit of an aeroplane they would be naturally so positioned that the gun would be supported by its trunnions slightly above the top of the cockpit, or to use the phraseology of claim 4 of the patent in suit, "*adapted to carry a gun support slightly above the level of the upper surface of the main body.*"

Such location would be essential in order that the gun might be aimed and fired over the edge of the cockpit.

28. United States patent to Gruson, #367,617 (defendant's exhibit 6), discloses a vehicle having an armored gun mount as disclosed in Figure 1 of the drawing illustrated in the findings.

The gun mount comprises a stationary circular supporting track or platform rigidly positioned at the top of the gunner's compartment just below the top edge. The movable circular portion of the gun carriage rotates on rollers car-

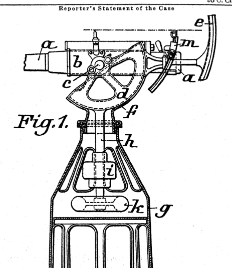


Figure 1 of the Völler patent # 1,014,384.

ried by this circular track. This movable ring portion carries trunnion mountings in which is fixed a gun capable of elevational movement in a vertical plane. The extent of the gun elevation is dependent upon the arc of the elevating rack and the length of the slot in the armored top, which are matters of mechanical design.

The trunnions are within the projection of the vertical cylindrical compartment wall and when the gun muzzle is elevated the inner or breech end projects below the top edge of the gunner's compartment and is enclosed thereby.

The gunner is positioned inside the stationary and movable rings and behind the gun, his position being always

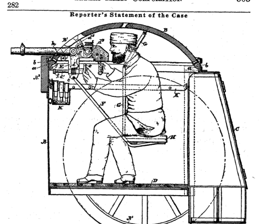


Figure 1 of the Gruson patent, #367,617.

maintained with respect to the gun by means of a seat mounted on the carriage. The specification states that the gunner may turn or rotate the circular top by the use of his feet on the floor of the compartment.

29. United States patent to McClean #749,214 (defendant's exhibit 15) discloses a pedestal type gun mount comprising a carriage having at its base a relatively large annular ring mounted on rollers for turning in a horizontal plane about its central vertical axis, the rollers operating on a circular fixed track for this purpose.

The upper end of the carriage is provided with trunnions for a machine gun. The gun is capable of adjustment both in elevation and train.

30. The British patent to Simms #7,387 of 1899 (defendant's exhibit 7), discloses a motor-driven vehicle having mounted thereupon a horizontally rotatable ring or turret which is rotatable with reference to a fixed circular base

ring or track. This turret carries at its upper part and slightly positioned above the car body a trunnion means in which a gun is mounted so as to be capable of elevational movement about its trunnions.

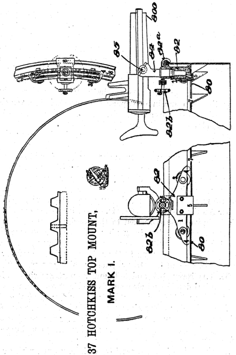
A seat for the gunner is positioned in the interior of the turret just behind the gun and is carried by the movable ring. When the gun muzzle is elevated, the rear or breech end is projected below the car body, the breech being at all times enclosed or positioned within the turret.

31. Page 122 and Plate 18 of Ordnance and Gunnery, published 1894 (defendant's exhibits 19 and 19–a), and page 13 and Plate 12 of Modern Gun Mounts in United States Navy, published 1894 (defendant's exhibit 18), contain identical references and drawings of what is known as the "37 Hotchkiss Top Mount."

The "Fighting top" or "Navy top" as known to those skilled in the art comprises a gunner's compartment formed by a circular wall and located on the mast of a warship at a considerable elevation above the deck level. The aforesaid exhibits refer to a gun mount construction for mounting a small gun in such a compartment.

Each of the above referred to publications discloses a circular gunner's compartment. As shown in the drawing reproduced from defendant's exhibit 18, it has a flat circular track or base ring 80 supported by brackets a short distance below the top edge of the circular wall. A gun carriage or traveler 82 is mounted on rollers for horizontal circular movement on this track. The upper portion of this carriage 82a projects over and around the top of the circular wall of the gunner's compartment and provides a clamping means for the gun carriage in conjunction with a hand wheel 82b.

The gun carriage is constructed with a socket for an upstanding goose-neck member 84 which carries at its top a trunnion mounting 85 in which a machine gun 800 is mounted, the goose-neck member providing for a pivotal or training movement and by means of the trunnion mountings providing for elevational movement of the gun in a vertical plane.



The gun with its trunnions is positioned slightly above the upper edge of the gunner's compartment, the trunnions being within the cylindrical projection of the compartment walls as well as the portion of the gun which extends inwardly therefrom. When the gun is trained upwardly the inner end thereof projects below the top edge of the compartment and is enclosed thereby.

The loosening of the hand clamp 82b permits the gunner to move the gun carriage bodily over the horizontal circular track and at the same time the gun may be adjusted independently both in horizontal train and in vertical elevation.

32. The Voller patent (see finding 27) shows the concept of mounting a gun in either an aeroplane or motor car to be known prior to the effective date of the invention here in issue.

The Myers patent in suit similarly contemplates the mounting of a gun in a compartment or cockpit in a vehicle adapted to travel over the surface of the earth as well as in an aeroplane. (See finding 7.)

33. It would not require more than mechanical ingenuity to apply the gun mounting of the Gruson patent (see finding 28) to the gunner's compartment or cockpit of the aeroplane instead of the compartment of the vehicle with which it is shown, and claims 3 and 10 of the patent in suit, when construed with sufficient breadth and scope to apply to the Scarff mounting of the defendant, are therefore invalid.

34. All the claims in issue, viz, 1 to 4, inclusive, and 10 to 12, inclusive, unless limited to the specific illustrated embodiment of the patent in suit in which the circular track is located in the cockpit or compartment at the bottom thereof and adjacent an opening in the bottom of the cockpit, are invalid in view of the Gruson patent vehicle gun mounting.

35. The Navy 3–A and 3–B gun mounts are similar in mechanical details and elements to the Navy top gun mount (see finding 31) and it would involve but mechanical skill to locate the circular track or a portion of the circular track of the Navy top mount and the associated gun mounting in the cockpit or gunner's compartment of an aeroplane instead of the gunner's compartment of a warship.

All the claims in issue are invalid if construed with sufficient scope to read upon the Navy 3–A and 3–B gun mounts.

36. It has been stipulated in this case that the question of unauthorized use of the invention by the United States be first determined upon full proofs, argument of counsel, and findings of fact, and that evidence as to the number of

articles involved, or the extent of use, or the amount of compensation, if any, due plaintiff, be deferred until and if an accounting is directed.

The court decided that the plaintiff was not entitled to recover.

Green, *Judge*, delivered the opinion of the court:

This suit is brought for the alleged infringement of patent No. 1,608,109, issued November 23, 1926, the patent stating that the "invention relates to vehicles, and particularly to that class thereof that are used in warfare." The original application, of which the patent in suit is said to be a division, was filed August 23, 1909. Between this date and the time the patent was issued, the alleged invention was withheld from the public.

The original application for a patent was "for improvements in flying machines." One of the objects stated was "to improve the means for supporting and operating a cannon."

The findings show in detail the disclosures made in the original application with reference to the method of mounting a gun or cannon on an aeroplane. The most important feature, as we view it, is that the gun mount is a rotatable carriage provided with wheels runnings on a track, and with horizontal trunnions, by means of which the gunner is enabled to aim the cannon in all directions within a hemisphere above the frame or body of the machine. Claims 29 to 34 of the original application refer to a combination of a flying machine and a cannon. Claims 29 and 34, which are typical of this group, are as follows:

> 29. A flying machine comprising a body having a gunner's compartment provided with an opening to the exterior of the body, a carriage rotatable within said compartment and projecting through said opening, and a cannon mounted on the carriage outside of said body.
>
> 34. A flying machine comprising a body having a gunner's compartment provided with an opening to the exterior of the body, a carriage rotatable within said compartment and projecting through said opening, a cannon mounted on the carriage outside of said body, and a gunner's seat arranged on said carriage.

On December 7, 1909, the Examiner in the Patent Office rejected claims 29 to 34 on the ground that there was no patentable relation between a flying machine and a cannon carried thereby. Thereafter claims 29 to 34 were cancelled by the patentee.

December 1, 1916, the patentee, Myers, filed a divisional application stating as follows:

> This invention relates to vehicles, and particularly to that class thereof that are used in warfare.
>
> It consists of a gun or cannon that can be turned in any direction on a vehicle.
>
> It further consists in improved means for supporting and operating the gun or cannon.

Claim 1 as filed read as follows:

> A vehicle comprising an elongated box-shaped body with tapering ends, means for driving and steering the vehicle, a turntable in the said body, a carriage mounted on the said table, and a cannon mounted on the said table.

The claim of infringement was based on two types of Government gun mounts. One of these types is known as the Navy 3–A and 3–B mounts. The findings of the commissioner are directly adverse to the plaintiff so far as the Navy 3–A and 3–B mounts are concerned and in this respect we do not understand the findings are seriously controverted by the plaintiff; consequently the Navy mount will not be considered.

The other alleged infringing mount is referred to in the findings as the Scarff gun mount and in the defendant's argument as the Barbette mount. It is exemplified by a Scarff mount upon a DeHavilland–4 aeroplane. A photograph of a Scarff mount on a DeHavilland–4 aeroplane accompanies Finding 15 which, together with Findings 16 and 17, describes in detail the Scarff mount, making reference to numbers on the photograph showing definitely the location of the parts described in the findings and making plain how they are used.

The photograph shows that the Scarff mount has a base ring or circular track rigidly secured on the top surface of the fuselage or body of the aeroplane and spaced outwardly

from the edge of a cockpit about two inches. An annular movable ring is concentrically mounted to rotate horizontally on this stationary ring, both of the rings being of greater diameter than the cockpit. There is nothing similar in the Scarff mount to the mechanism in the Myers mount except the two rings which, however, are located very differently. In the Myers mount the rings are located at the base of the cockpit around an opening therein but in the Scarff mount the rings are placed above and outside the cockpit.

Claim 3 does not locate the runway other than by the statement that it is disposed about the cockpit, but the drawings which accompanied the patent and are reproduced in connection with Finding 8, show that the rotating ring is located in the bottom of the cockpit, which is sufficiently large to receive not only the gunner but the gun mounting. The structure disclosed is such that the rings must necessarily be within the cockpit. An opening is provided in the bottom of the cockpit and in the rotating platform, so that if desired the gun muzzle may be depressed and a downward cone of fire may be obtained.

Claims 3 and 10 when not limited to the specific illustrated embodiment of the patent in suit, in which the circular track is located in the bottom of the cockpit and adjacent to an opening therein, would apply to the Scarff mount, but if read broadly enough to cover the Scarff mount, that is—to apply to rings used for the purpose of rotation wherever located—then these claims are invalid because anticipated by the Voller, McClean, and Gruson patents, as hereinafter shown and found by our commissioner.

The findings of our commissioner, if sustained, are sufficient to defeat the plaintiff's claims in all respects. The plaintiff, however, excepts to these findings and asks that a number of changes and additions be made thereto. There are some additions that are asked by plaintiff that are supported by the evidence, but we think they are not material to the issues in the case. Where changes are asked in the findings we agree with the commissioner and think his findings are fully supported by the evidence.

Finding 25 shows that the Voller patent, although issued October 15, 1912, was made on an application filed May 3, 1909, prior to the filing date of the original Myers application. It is directed to the concept of a gun mounted in an aeroplane. Like the gun in the patent in suit, the gun in that patent had a set of trunnions for adjustment in a vertical plane. Provision for horizontal rotation of the trunnion bracket was provided by means of a movable circular ring rotating on ball bearings on the rim of a second fixed circular race or track placed at the top of a conical portion of a fixed base. The gun may therefore be trained horizontally to any desired position and may also be adjusted through a large elevational angle on its trunnions. Although the Voller patent does not disclose the precise location of the gun, it is obvious that in order that it might be operative it must be placed in a cockpit and the gun must be supported by its trunnions somewhat above the top of the cockpit, which is apparently what is intended by the phraseology of claim 4 of the patent in suit, viz. "adapted to carry a gun support slightly above the level of the upper surface of the main body."

We think that the application of this patent shows that the concept of a gun mounted in an aeroplane in the same general manner as the gun in the patent in suit was not new when the application for the Myers patent was made, but it is not necessary to rest the decision in this case upon such a conclusion. At least the Voller patent shows that there was nothing new in the concept of mounting a gun in an aeroplane in such a manner that the line of fire could be adjusted either horizontally or vertically.

The United States patent to Gruson, described in Finding 28, was issued October 2, 1887, and discloses a vehicle having an armored gun with a stationary circular supporting track or platform rigidly positioned at the top of the gunner's compartment just below the top edge. The movable circular portion of the gun carriage rotates on rollers carried by this circular track, and this movable ring portion carries trunnion mountings in which is fixed a gun capable of elevational movement in a vertical plane (see figure 1

of the Gruson patent set out in Finding 28). As said in Finding 33, it would not require more than mechanical ingenuity to apply the gun mounting of the Gruson patent to the gunner's compartment or cockpit of the aeroplane instead of the compartment of the vehicle with which it is shown. It is true that the Gruson patent did not contemplate the placing of the gun carriage in an aeroplane, but as said by the examiner in the Patent Office (Finding 4) there is no patentable relation between a flying machine and a cannon carried thereby.

An important issue in the case is whether claims 3 and 10 are anticipated by the patent to Gruson. It is said that the rotating circular ring 82, which is present both in the Scarff and Myers mounts, is wanting in the Gruson design, and that instead there is a solid armor plate top B, and suspended from this top the gun and gunner's seat. This presents a misleading picture. The gun mount in the Gruson patent is carried by the lower edge or periphery of the shield or top B, which is semispherical; and this edge forms the mechanical equivalent of the circular ring 82 in the Myers mount and rotates in an identical manner, moving upon rollers. In fact the ring is there, but the shield was imposed upon it. It would be perfectly evident to any one skilled or unskilled that if the shield was put above the gunner it would act as a protection. It was equally evident, we think, that the protective shield was not essential for the support and rotation of the gun.

It is specially insisted that the Gruson patent was never intended to be used in an aeroplane and that it is not adapted to such use. We think it is immaterial whether it was intended to be used in an aeroplane, if the aeroplane was later improved and made suitable for its use. At the time the Gruson patent was issued (1887) aeroplanes were in a preliminary stage so far as warfare was concerned. If anyone had a conception of using a plane for combat purposes it had not been made public at that time, but with the advancement in the art of constructing aeroplanes they became capable of carrying guns, and as has already been shown, the Voller patent described a method of mounting a

gun in them in such a manner that the direction for firing would be adjustable. The important feature of the Gruson design was in the adaptability of the gun mount. No change was necessary in this respect to make it suitable for use in the newer designs of aeroplanes. The change was in the capacity of the aeroplane itself, so that it became capable of carrying a gun with an adjustable mount; and improvements in carrying capacity were every day being made until at the time of the World War, before the Myers patent was issued, fighting planes carrying a gun were a part of the regular equipment of the armies engaged. The fact that the Gruson structure was not intended to be used in an aeroplane, does not alter our conclusion that the feature of a gun mounted in a compartment and adjustable as to its direction of fire was disclosed by the Gruson patent. *Topliff* v. *Topliff*, 145 U. S. 156, cited by plaintiff, we think has no application to the facts in the case at bar.

It is also urged on behalf of plaintiff that if changes were made in this solid cover B the whole plan of the Gruson patent would have to be reorganized. On the contrary we think it would be evident to anyone skilled or unskilled that if the protective cover was entirely omitted except the ring portion at the lower edge thereof, the gun could be operated with perfect freedom without any other changes. The movable ring portion which supports the gun carriage would still remain. It is true the Gruson patent was on a combination which included a protective cover, but we are now discussing whether the essential elements of the Myers patent were disclosed by that of Gruson, and we are of the opinion that they were. That the ring in the Gruson patent was on the lower part of the protective shield and united with it, we think is immaterial to the issues here involved. As stated above it was supported by rollers and rotated in a similar manner to the ring of the Myers patent. If the protective top so obstructed the view of the gunner as to make it of no advantage it could be discarded entirely and still retain the features which made the direction of fire adjustable. If it was thought that the slot in the top did not provide sufficient scope for upward fire this could be

enlarged. Both of these features are merely matters of mechanical design capable of modification by any one skilled in the art.

What is said above is sufficient to dispose of the case, but there are some other matters which, if necessary, may be considered as supporting the defense.

We have already shown that there was nothing new in mounting a gun in an aeroplane at the time when plaintiff applied for his patent, and that there was nothing new in providing for an adjustable mount. In further support of this conclusion with reference to an adjustable mount we would call attention to the patent issued to McClean, January 12, 1904. This disclosed a pedestal type gun mount comprising a carriage having at its base a relatively large annular ring mounted on rollers for turning in a horizontal plane about its central vertical axis, the rollers operating on a circular fixed track for this purpose. The upper end of the carriage was provided with trunnions which supported a machine gun capable of adjustment both horizontally and vertically through the means above stated. The application seems to assume that there was nothing new in mounting a gun so its direction would be adjustable both horizontally and vertically and presented a complicated system of loading and firing upon which the inventor rests his claims to a patent. The vertical adjustment is regulated and controlled by complicated contrivances not necessary to set out here. It is sufficient to say that the gun swings vertically on its trunnions under an elaborate system for controlling and fixing its movements. It will be observed that the annular ring upon which the carriage rotates horizontally is located at the base of the carriage as it was in the plaintiff's patent.

The McClean patent in our opinion furnishes another instance of anticipation of the concept of providing a means for horizontal rotation through the use of a movable ring supported by rollers carried on a stationary ring below.

Our conclusion is that if the patent in suit is read so as to apply to the Scarff mount it was anticipated by prior patents and designs and is therefore invalid. If not so read

and confined to the specific embodiments disclosed in the Myers patent there was no infringement, as the Scarff mount was an altogether different structure from that disclosed by the patent in suit.

It follows that the petition must be dismissed, and it is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

KENNETH H. CORNELL v. THE UNITED STATES

[No. M-283. Decided April 7, 1941]

On the Proofs

Pay and allowances; bachelor officer in U. S. Marine Corps.—Decided upon the authority of *Hartsel* v. *United States*, 92 C. Cls. 127, and cases preceding.

The Reporter's statement of the case:

Mr. Rees B. Gillespie for the plaintiff. *Mr. John W. Price* was on the brief.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special finds of fact, showing that the plaintiff was a bachelor officer of the U. S. Marine Corps. From November 7, 1930, to August 31, 1931, he held the rank on the active list of second lieutenant, and from September 1, 1931, to November 4, 1931, he held the rank of first lieutenant.

From November 7, 1930, to November 4, 1931, plaintiff was attached to the Fourth Brigade of the Marine Corps at Shanghai, China. During one month, while he was stationed at Shanghai, he was furnished as quarters, and occupied, a single room in a building located at Pacific Gardens No. 2. This building had been secured by the Quartermaster of the Marine Corps for the purpose of accommodating officers.

During the remainder of the period while plaintiff was serving in Shanghai, with the exception of twenty days when he resided in the Officers' Club, he and another officer lived in quarters consisting of five rooms—two bedrooms, a living room, a dining room, a servant's room, and a kitchenette. Plaintiff purchased bedding, rugs, wardrobe, bookcase, and tables for use in these rented quarters. He paid $20 in gold per month as rental for the quarters. During the period of twenty days immediately preceding his departure from Shanghai plaintiff lived in the Officers' Club, occupying a room which was furnished with a cot.

Plaintiff did not expend any money for the rental of quarters while he resided at Pacific Gardens No. 2 or the Officers' Club. He was required to pay rent only for quarters after he voluntarily moved from Pacific Gardens No. 2 and while he lived in the rented building.

The court decided that the plaintiff was entitled to recover, in an opinion *per curiam*, as follows:

Plaintiff, a commissioned officer in the United States Marine Corps, sues for the rental allowance of an officer of his rank and grade, without dependents, for the period from September 24, 1930, to October 31, 1931. From November 7, 1930, to November 4, 1931, plaintiff was attached on active duty to the Fourth Brigade of the Marine Corps at Shanghai, China.

Plaintiff was paid the rental allowance prescribed by law from September 24, 1930, to November 7, 1930, both inclusive. During the remainder of the claim period there was available to plaintiff for occupancy Government quarters consisting of one room. Under such facts plaintiff is entitled to recover the difference in value between the quarters made available by the Government and the value of those to which he was entitled under law, namely, two rooms. *Hartsel* v. *United States*, 92 C. Cls. 127; *Francis* v. *United States*, 89 C. Cls. 78; *Beery* v. *United States*, 87 C. Cls. 557; *Byrne* v. *United States*, 87 C. Cls. 241; and *Hollister* v. *United States*, 92 C. Cls. 137. The fact that plaintiff, believing the quarters furnished inadequate, voluntarily moved out and leased others at his own expense does not remove the case

from the rule of the above decisions. There can be no recovery for the furniture purchased by plaintiff for use in his quarters. *Taxis* v. *United States*, 91 C. Cls. 305.

Plaintiff is entitled to recover $235.34. It is so ordered.

RAGAN-MALONE COMPANY v. THE UNITED STATES

[No. M-377. Decided April 7, 1941]

On the Proofs

Income and profits tax; date of original petition.—Where plaintiff on October 10, 1931, filed its original petition in the instant case, reciting that it had on September 14, 1929, filed a claim for refund for taxes paid in 1926 for the years 1918 and 1919, on the ground that the assessment and collection of said taxes had been barred by the statute of limitations, and reciting, further, that it had on October 11, 1929, filed claims for refund for the taxes paid in 1926 for the years 1918 and 1919 on the ground that the Commissioner had refused to allow as deductions payments made to employes which payments plaintiff claimed to be compensation for services; and where, after the Commissioner of the Court of Claims on June 6, 1936, had made his report, the plaintiff thereafter on April 4, 1938, filed its amended petition reciting it had filed claims for refund on December 13, 1926, October 11, 1929, and September 27, 1930, and reciting further the action and the failure to act of the Commissioner of Internal Revenue thereon; and where the Commissioner of Internal Revenue had treated the claims of October 11, 1929, as requests for reconsideration of his former rejection on August 3, 1927, of the claims of December 13, 1926, and on April 11, 1930, had denied the application to reopen said claims; it is *held* that the instant suit was begun on April 4, 1938, when the amended petition of plaintiff was filed, and is accordingly barred by the statute of limitations; having been instituted eleven years after payment, where only five years are permitted, and nine years after rejection, when only two years are permitted.

Same.—Where plaintiff's original petition filed in 1931 recited in an intermediate paragraph that claims for refund had been made on the grounds relied on in the instant suit and was specific in stating the grounds upon which it claimed that "said sum is erroneously, illegally, and wrongfully withheld" from the plaintiff; it is *held* that neither the paragraph

quoted nor the petition as a whole contained any general language which could include the ground asserted in the amended petition and exclusively relied on by plaintiff in the instant suit.

Same, amended petition.—The cause of action relied on in the amended petition, it is *held*, is in fact a new cause of action and not a mere particularization of the old.

Same, dilatory conduct.—Where even after the fact that the original petition did not include the ground of recovery relied on in the instant case was brought out at the hearing before the Commissioner of the Court of Claims; and where plaintiff then indicated its intention to amend the petition; and where the Commissioner for that reason admitted only conditionally the testimony offered by plaintiff on said ground; and where the plaintiff then waited nearly 5 years before amending its petition, it is *held* that such dilatory conduct cannot be encouraged by the Court.

Same; repetitions.—The documents filed by plaintiff in 1930 as claims for refund were not effective legal claims, but were mere repetitions of the claims which had been filed in 1926, and rejected in 1927, and as to which an application to reconsider had been made and disallowed in 1929.

Same.—A taxpayer cannot keep his claim fresh indefinitely merely by repeating it.

The Reporter's statement of the case:

Mr. Charles B. McInnis for the plaintiff. *Mr. C. Leo DeOrsey* was on the brief.

Mr. J. A. Rees, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff was incorporated September 7, 1909, pursuant to the laws of Georgia, for a period of 20 years with the privilege of renewal at the expiration of that time. From the date of incorporation until about April 1, 1925, plaintiff was engaged in the wholesale drygoods and notions business as jobbers, with its principal place of business in Atlanta, Ga.

2. About April 1, 1925, plaintiff began a voluntary liquidation and made a voluntary deed of assignment for that purpose. It did not thereafter resume its merchandizing

business and thereafter transacted no business other than such matters as were connected with the liquidation.

3. When the twenty-year period provided in its charter for the term of its corporate existence terminated September 7, 1929, plaintiff allowed the charter to expire without renewal at that time. However, June 29, 1934, on application of plaintiff's officers and directors an order was issued by the Superior Court of Fulton County, Ga., reviving the original charter and extending it for a period of 20 years from that date.

4. December 30, 1918, plaintiff, pursuant to the provisions of the Revenue Act of 1917, filed its income and profits tax return for the fiscal year ended November 30, 1918, showing a tax liability of $68,920.20. June 15, 1919, plaintiff filed a similar return for the same year under the Revenue Act of 1918, which disclosed a tax liability of $100,090.86.

February 21, 1919, on his January 1919 assessment list, the Commissioner of Internal Revenue assessed the original tax of $68,920.20 shown on the first return filed for the fiscal year ended November 30, 1918, and on October 30, 1919, assessed an additional amount of $65,630.49, on account of the tax shown due on the return for the same year filed June 15, 1919, making the total assessments against plaintiff $134,550.69 for the fiscal year ended November 30, 1918. Payments were made in 1919 on account of such assessments as follows:

January 2, 1919	$17,230.32
January 24, 1919	17,230.05
June 15, 1919	15,585.06
September 23, 1919	25,022.72
September 23, 1919	23,316.45
Total	98,384.60

These payments left a balance outstanding of the assessments for the fiscal year ended November 30, 1918, of $36,166.09.

5. January 21, 1920, plaintiff filed a claim for abatement of $1,357.89 for the fiscal year ended November 30, 1918. March 27, 1920, the Commissioner advised plaintiff that the claim for abatement would be rejected and the collector for its district would return its bond upon the payment of the tax covered by the abatement claim. Pursuant to an exam-

ination and report of a revenue agent dated October 20, 1923, the Commissioner on January 28, 1924, advised plaintiff of the determination of an overassessment for the fiscal year ended November 30, 1918, of $30,235.41. On or about April 12, 1924, the collector delivered to plaintiff a certificate of overassessment for the fiscal year ended November 30, 1918, of $30,235.41, such certificate showing a total assessment of $134,550.69, the correct tax liability $104,315.28, and further showing that the amount of overassessment had been abated. After that abatement had been made there remained an outstanding balance of the assessments for the fiscal year ended November 30, 1918, of $5,930.68.

April 24, 1924, plaintiff filed a claim for credit of $5,582.31 and at the same time referred to a previous claim for credit of $348.37, making a total of $5,930.68. Upon receipt of that claim the collector suggested to plaintiff that apparently the claim for credit of $5,930.68 should have been filed as a claim for abatement, and thereafter plaintiff took the necessary action to make the change suggested by the collector.

February 12, 1925, the Commissioner advised plaintiff that its protest dated August 29, 1924, against the determination set forth in his letter of January 28, 1924 (referred to in the first paragraph of this finding), had been carefully considered but that the contentions set out therein had been denied, thereby sustaining the previous determination of plaintiff's tax liability of $104,315.28 for the fiscal year ended November 30, 1918, and that its claim for abatement of $5,930.68 "will be rejected in full." The amount covered by the abatement claim was paid in two installments of $1,706.26 and $4,224.42 on September 28, 1926, and November 26, 1926, respectively, as shown in finding 8.

6. February 16, 1920, plaintiff filed its income and profits tax return for the fiscal year ended November 30, 1919, showing a tax liability of $56,920.84, which was assessed March 18, 1920. The tax liability so assesed was paid in part during 1920 as follows:

February 16, 1920	$14, 230. 21
May 17, 1920	14, 230. 21
August 18, 1920	5, 015. 43
November 16, 1920	11, 158. 62
Total	44, 634. 47

These payments left an outstanding balance for the fiscal year ended November 30, 1919, of $12,286.37. April 28, 1920, plaintiff filed a claim for credit of an alleged overpayment of $12,286.37 for the taxable year 1918 against its outstanding tax liability for the taxable year 1919.

7. January 13, 1925, as a result of a letter from the Commissioner dated January 7, 1925, plaintiff filed a waiver which extended the period for making assessments for the fiscal year ended November 30, 1919, to December 31, 1925, and that waiver was duly accepted by the Commissioner. December 10, 1925, the Commissioner mailed a deficiency notice to plaintiff for the fiscal year ended November 30, 1919, showing a deficiency of $11,270.97. December 12, 1925, plaintiff executed and forwarded to the Commissioner an agreement consenting to the immediate assessment of the foregoing deficiency for the fiscal year ended November 30, 1919. The agreement was received by the Commissioner December 14, 1925, and the deficiency was assessed by the Commisioner December 22, 1925.

8. September 28, 1926, plaintiff paid to the collector $23,-557.34, the remaining outstanding balance ($12,286.37) of original tax assessed for the fiscal year ended November 30, 1919, and the deficiency ($11,270.97) referred to in finding 7, and at the same time also paid $1,706.26 for the fiscal year ended November 30, 1918. Prior to the payment of $1,706.26 there was an outstanding balance due for the fiscal year ended November 30, 1918, of $5,930.68, and the foregoing payment reduced that amount to $4,224.42, which was paid by plaintiff November 26, 1926. In addition to the principal amounts paid, as set out in this finding, plaintiff paid interest as follows:

a. $1,634.85 as interest upon $4,224.42 paid November 26, 1926, as original tax for the year 1918.

b. $638.61 as interest upon $1,706.26 paid September 28, 1926, as aditional tax for the year 1918.

c. $3,941.47 as interest upon $12,286.37 paid September 28, 1926, as original tax for the year 1919.

d. $347.71 as interest upon $11,270.97 paid September 28, 1926, as additional tax for the year 1919.

9. Plaintiff filed seven separate formal claims for refund for the fiscal year ended November 30, 1918, and eight similar claims for the fiscal year ended November 30, 1919. A summary of the facts relating to the various claims follows:

FISCAL YEAR ENDED NOVEMBER 30, 1918

A. A claim for $25,000 filed December 13, 1926, based upon (a) allowance of employees' bonuses as a deduction for wages paid; (b) special assessment under the provisions of section 210 of the Revenue Act of 1917, and sections 327 and 328 of the Revenue Act of 1918; (c) the collection of $4,224.42 after the statute of limitations for collection had expired, and (d) any other adjustments respecting income and invested capital.

B. A claim for $1,706.26 and a claim for $4,224.42, both filed March 15, 1927, and both containing the same grounds, namely, that these payments were barred by the statute of limitations when made and therefore these amounts were erroneously and illegally collected.

C. July 18, 1927, the Commissioner advised plaintiff that the three claims referred to in paragraphs A and B above would be rejected in full and they were formally rejected August 3, 1927.

D. A claim for $13,992.63 filed July 19, 1928, based solely on the ground that plaintiff was entitled to special assessment. October 2, 1928, the Commissioner advised plaintiff that the claim was considered as an application for a reopening and reconsideration of a prior claim which stated the same ground, and, after reciting the previous action which had been taken, denied the request for a reopening and reconsideration, concluding such action with the following statement:

> In view of the foregoing this office has carefully considered the Forms 853 which you have filed and concludes that the previous decisions of the Bureau should be sustained and your request for the reopening and reconsideration of your tax liability for the fiscal years ended November 30, 1917 to 1919 is denied.

E. A claim for $5,930.68 filed September 14, 1929, based upon the ground that this tax "was not assessed against this taxpayer by the Commissioner, and/or was not collected at a time when the Commissioner had a legal right so to do; or it was assessed and/or collected at a time when the assessment and/or collection was barred by the Statute of Limitation."

September 28, 1929, the Commissioner advised plaintiff that the claim would be rejected in full and it was rejected on a schedule dated October 10, 1929.

F. A claim for $5,930.68 filed October 11, 1929, based upon the sole ground that compensation paid or accrued to employees for so-called dividends or bonuses on stock is a proper deduction in determining taxable income, and urging that there had been a change in policy on the part of the Bureau of Internal Revenue from that followed at the time a previous claim on the same ground had been considered and disallowed. The Commissioner treated the claim as a request for a reopening and reconsideration of a prior claim and April 11, 1930, denied such request, his letter reading in part as follows:

> The forms are considered as requests for reopening the years in question due to the fact that in refund claims filed in December, 1926, for those years, the same issue was presented as is now made the subject of those forms.
>
> It is contended that since the stock bonus plan adopted by the taxpayer in 1916 contains provisions similar to those set forth in a general discussion of such plans in an article appearing in the May, 1929 issue of the Internal Revenue News, wherein it was stated that under certain conditions, such payments may be deducted by a corporation as compensation to employees, income of the corporation should be adjusted for the years in question to reflect payments made under that plan.
>
> However, it should be observed that the primary reason ascribed in the article referred to for the deductibility of such payments in some cases as compensation to employees is the fact that title to the stock remains in the corporation until such time as payments under the plan have been completed and consequently amounts credited to employees' accounts pending existence of

all conditions precedent to ownership of subscription stock could not in point of law represent dividends.

In the instant case, by the terms of the resolution creating the stock bonus plan, ownership of the stock would necessarily be vested in the subscriber thereto within the fiscal year of taxpayer, since it is provided in the resolution that "such subscriptions may be paid in cash or in monthly installments of not less than $10.00 per month on any one subscription, and deferred payments for such subscriptions shall be closed by note or a series of notes, the last of which shall mature within the fiscal year * * ." It thus appears that, since ownership of the stock was acquired by a subscriber in each case within the fiscal year of the taxpayer, it cannot be held that the payments thereon did not constitute dividends paid by the corporation.

Accordingly, it follows that, as dividends, the payments in question may not be permitted to be deducted from gross income of the taxable years under discussion.

In view of the above facts, it is the opinion of this office that the requests for reopening the fiscal years ended November 30, 1918, and November 30, 1919, cannot be allowed and the applications are accordingly denied.

G. A claim for $5,930.68 filed September 27, 1930, stating several grounds including (a) collection at a time when the statute of limitations had run; (b) deduction for so-called dividends or bonuses as additional compensation to employees; (c) correction in the computation of the war profits credit; (d) benefit of section 205 of the Revenue Act of 1917; (e) deductibility of the income tax for 1917 from gross income for 1918; and (f) special assessment. Prior to stating the foregoing grounds the claim set out:

> Refund claims have heretofore been filed on behalf of this corporation for the refund of a part or all of the tax paid for this taxable year, and this claim is intended to be a new claim, as well as an amendment to or completion of prior claims.

The record contains no evidence showing the action taken, if any, by the Commissioner upon this claim.

FISCAL YEAR ENDED NOVEMBER 30, 1919

A. A claim for $14,440.50 filed January 9, 1924, based on a request for the application of sections 327 and 328 of the

Revenue Act of 1918. December 10, 1925, the Commissioner advised plaintiff of his determination of a deficiency ($11,-270.97) for the fiscal year ended September 30, 1919 (See finding 7), and in the same communication made the following reference to action on the foregoing claim for refund:

> Inasmuch as your application for assessment under Section 328 of the Revenue Act of 1918 has now been withdrawn, the rejection of your claim for refund of $14,440.50, based upon such application as set forth in Bureau letter of February 12, 1927, is accordingly sustained.

B. A claim for $25,000 filed December 13, 1926, stating as grounds that refunds should be made "due to increased invested capital on account of paid-in surplus; decreased income on account of bonuses disallowed; special assessment; or any other adjustments respecting income or invested capital."

C. A claim for $12,286.37 and a claim for $11,270.97, both filed March 15, 1927, stating as grounds therefor that "at the time of payment this tax was barred by the Statute of Limitations and the amount was erroneously and illegally collected."

D. July 18, 1927, the Commissioner advised plaintiff that the claims referred to in B and C above would be rejected, and they were formally rejected on a schedule dated August 3, 1927.

E. A claim for $11,270.97 filed July 19, 1928, based solely upon a request for special assessment. October 2, 1928, the Commissioner advised plaintiff that the claim was considered a request for a reopening and reconsideration of a prior claim which stated the same ground and denied the request in the same manner as a similar claim for the fiscal year ended November 30, 1918. (See paragraph D above for the fiscal year ended November 30, 1918.)

F. A claim for $23,557.34 filed September 14, 1929, based solely upon the ground that this tax "was not assessed against this taxpayer by the Commissioner, and/or was not collected, at a time when the Commissioner had a legal

right so to do; or it was assessed and/or collected at a time when the assessment and/or collection was barred by the Statute of Limitation." September 28, 1929, the Commissioner advised plaintiff that the foregoing claim would be rejected in full and it was rejected on a schedule dated October 10, 1929.

G. A claim for $23,557.34 filed October 11, 1929, stating as its sole ground that compensation paid or accrued to employees for so-called dividends or bonuses on stock is a proper deduction in determining taxable income, and urging that there had been a change in policy on the part of the Bureau of Internal Revenue from that followed at the time a previous claim on the same ground had been considered and disallowed. The Commissioner treated the claim as a request for a reopening and reconsideration of a prior claim and denied such request, his letter reading as shown in paragraph F above for the fiscal year ended November 30, 1918.

H. A claim for $23,557.34 filed September 27, 1930, stating several grounds including (a) collection at a time when the statute of limitations had run; (b) deduction for so-called dividends or bonuses as additional compensation to employees; (c) correction in the computation of the war profits credit; (d) correction of invested capital as provided by Article 845 (a) of Regulations 45; (e) deductibility of the income tax for 1918 from gross income for 1919, and (f) special assessment. Prior to stating the foregoing grounds the claim set out:

> Refund claims have heretofore been filed on behalf of this corporation for the refund of a part or all of the tax paid for this taxable year, and this claim is intended to be a new claim, as well as an amendment to or completion of prior claims.

The record contains no evidence showing the action taken, if any, by the Commissioner upon this claim.

All the claims for refund referred to in this finding except those referred to in paragraph G, for the fiscal year ended November 30, 1918, and paragraph H, for the fiscal year ended November 30, 1919, were duly sworn to and signed

"Ragan-Malone Co. by James J. Ragan, Pres." The two claims referred to in paragraphs G and H, respectively, and just mentioned, were duly sworn to and signed "Ragan-Malone Co. by Willis E. Ragan, Vice Pres." James J. Ragan was president of plaintiff corporation from December 11, 1923, to October 14, 1926, when, as previously stated, he was duly appointed liquidating agent for the corporation. Willis E. Ragan was vice president of plaintiff corporation from December 31, 1923, and director from December 9, 1924. No regular or special meetings of either the stockholders or the directors of plaintiff were held from October 15, 1926, to May 27, 1934.

10. August 12, 1916, plaintiff's stockholders adopted a resolution providing for the issuance of a separate series of additional capital stock not in excess of $30,000, to be known as "Employees' Profit-Sharing Stock," hereinafter referred to as "special stock," which was to be sold exclusively to plaintiff's employees. The material portions of that resolution read as follows:

> Said stock shall be issued in shares of the par value of $100.00 each as subscribed for exclusively by employees of said corporation who have been in its service not less than two years prior to the time of their several subscriptions. Such employees shall be entitled to subscribe to said stock during the first two months of any fiscal year of said corporation (which fiscal year runs from December 1st to December 1st) in a sum not exceeding the percentage hereinafter stated. Such subscriptions may be paid in cash or in monthly installments of not less than $10.00 per month on any one subscription, and deferred payments for such subscriptions shall be closed by note or a series of notes, the last of which shall mature within the fiscal year, which said notes for deferred payments shall draw interest at the rate of six percent per annum.
>
> Said stock shall be treated, so far as dividends are concerned, as full paid stock upon the giving of said notes, but all dividends and bonuses declared on said stock shall be first applied to the liquidation of any balances, if any, due on said subscription notes. No subscription for additional stock in said series shall be

made by any employee in any succeeding year unless all previous subscription notes have been paid in full.

Stock in this series shall be especially preferred stock as to payment of dividends and bonuses and (on liquidation or retirement) the full par value thereof over and above the common stock of said corporation, but in all respects subject to the rights and preferences of the outstanding eight hundred shares of 6% preferred stock of this company.

Whenever the earnings of said corporation justify it cash dividends of six percent per annum shall be declared and paid on this series of stock on December 1st of each and every year, and said dividends shall be paid next after the payment of the dividends on said eight hundred shares of 6% preferred stock now outstanding and in preference to any dividends on the common stock.

In addition to said cash dividends this series of stock shall be entitled to bonuses under the following conditions, to wit:

1. After the payment of the operating expenses of said business and of six percent on all its issues of stock, and customary allowances for bad debts and depreciation, if the balance to credit of profit and loss in any given fiscal year of said corporation amounts to $10,000 or over and not exceeding $15,000, a bonus of $5.00 per share on this series of stock shall be paid and charged to said profit and loss account; and such bonus shall terminate all right or further participation of said stock in the profits of said business for that year.

(Here followed similar provisions where the credits to profit and loss were in amounts from $15,000 to $35,000.)

* * * * * * *

7. In like manner, if said balance to the credit of profit and loss under said conditions equals or exceeds $40,000, said bonus shall be $30.00 per share on this series of stock, which shall extinguish its right of participation in the profits of the business for that year.

After payment of bonuses under the conditions named, the entire balance standing to the credit of profit and loss account in said corporation shall be distributed to the holders of the common stock in accordance with the pooling contract between them.

None of this special series of stock shall be issued after January 31st, 1923, and the entire issue of said

stock then outstanding shall be retired on the terms and conditions herein stated within sixty days after December 1, 1923.

None of the stock issued in this series can be sold, assigned, transferred, pledged, or hypothecated by any of the holders thereof, but certificates for the same when issued shall be deposited by the parties subscribing thereto with the treasurer of this corporation and shall be kept by said treasurer in suitable fireproof receptacle so long as the same is outstanding, and said corporation shall at all times have prior lien on said stock to secure the payment of any indebtedness due to the company from the subscriber thereto or holder and owner thereof.

Within two months following the close of each fiscal year of said corporation, that is to say between December 1st and February 1st, following, the said employees and the said corporation shall have the following options relative to said stock:

(a) Said corporation shall have the unqualified option at its pleasure to take up and retire any of this series of stock at the time outstanding by the payment of the par value thereof to the party in whose name said stock was issued, or his legal representatives, together with all dividends and bonuses due and unpaid thereon, first deducting therefrom any indebtedness, if any, due to this corporation from such employee, or his estate in case he is dead.

(b) During the same period of time any of the employees of said company, and holders of any of this series of stock, shall have the right and option to surrender, cash in, and retire, his or their said holdings and shall be entitled to receive the par value thereof, together with any dividends and bonuses due thereon remaining unpaid, less any indebtedness due to said corporation, and in case of death of any such employee his personal representative shall have the right to exercise this option.

At no other period and under no other conditions can such stock be paid off and retired, and in all such cases the status of such stock as to dividends and bonuses shall be as fixed by the closing of the books at the end of the preceding fiscal year of said corporation, to wit, November 30, preceding.

The right to bonuses on said stock hereinbefore stipulated shall cease and determine whenever the holder of any such stock ceases to be an employee of said com-

pany by resignation, or other means, except in case of death. In case of the death of any such employee the right of bonuses and dividends shall continue up to the date of such death and shall be ascertained from the condition of the books of said corporation as last closed and the average of the preceding twelve months' operations of said company prior to the last close of said books upon the beginning of the fiscal year up to the death of such employee.

In the event said corporation has its books audited by a certified public accountant at or about the close of the fiscal year of said corporation, then the report of said auditor as to the net earnings of said corporation applicable to dividends and bonuses on this issue of stock shall be binding and conclusive on the corporation and its employees and the then owners of this stock as to the amounts payable on said stock under these terms of its issuance.

The right of the employees of said company to subscribe to this stock shall be limited to twenty-five per cent of the yearly salary or commissions of such employee earned during the preceding year. No fractional shares will be issued. All subscriptions to said stock are subject to acceptance by the Board of Directors.

This series of stock shall not be entitled to any vote in the corporate action of said company.

The certificates for this series of stock in said corporation shall contain on their face an express reference to these resolutions, which resolutions shall thereby become a part of such certificate, and the party in whose name said certificate is issued and his heirs, executors, administrators and assigns shall be in all respects bound by each and all of the terms and conditions herein expressed and upon which alone said stock is authorized to be issued.

December 19, 1916, plaintiff's Board of Directors adopted the following resolution:

Resolved, That the officers of this corporation are hereby expressly authorized to pay out of the net earnings of the Company the usual three percent semi-annual dividends on capital stock account as well as dividends on the employees' profit-sharing stock on June 1st and December 1st, provided the net earnings as they appear on the books of the Company on said dates justify said payment; * * *

11. In accordance with the resolution of August 12, 1916, referred to in the preceding finding, approximately ninety-five percent of plaintiff's employees who were eligible thereunder subscribed to and became owners of shares of special stock as follows:

Employes	Shares issued during years ended November 30—			Total
	1917	1918	1919	
Hanes Brothers	25	34	60	119
S. B. Hanes.				
J. C. Hanes.				
John C. Hanes	1			1
J. L. Warman	3	3		6
J. C. DeFreese	2	3	3	8
J. G. Robertson	5	4	15	24
W. C. Daniel	2	3	4	9
Z. F. Daniel	6	8	14	28
S. H. Morgan	3	3	3	9
W. W. Scott, Jr		5	10	15
F. E. Hanna		1	3	4
M. C. Croft		5	14	19
J. R. Pickens		3	11	14
B. S. Sharp			2	2
W. R. Rumph			10	10
F. A. Yarbrough			3	3
John V. Freel			2	2
S. G. Jones			2	2
C. B. Pritchett			1	1
W. L. Foster			2	2
W. M. Johnson			2	2
(Unidentified)		1		1
Total	47	73	161	*281

*Three unidentified shares were retired on December 3, 1918.

No special stock was issued during the fiscal year ended November 30, 1916. The total number of shares of special stock issued and outstanding at the close of the three succeeding fiscal years was as follows:

November 30, 1917 — 47 shares
November 30, 1918 — 120 shares
November 30, 1919 — 278 shares

None of plaintiff's employees who so subscribed for any of the special stock owned any of plaintiff's common or preferred stock and none of the special stock was subscribed for or owned by any of plaintiff's officers.

12. At meetings of plaintiff's Board of Directors on December 11, 1917, and December 10, 1918, resolutions were adopted which in each instance read as follows:

> On motion duly seconded the officers are directed to pay in addition to the 6% per annum dividend on profit-sharing stock of employees a bonus of $30 per share for the current year, payable all cash to the holders of the stock entitled thereto under the resolutions under which said stock was issued adopted at the stockholders' meeting of said company held on August 12, 1916, and appearing in this Minute Book beginning at page 66.

At a meeting on December 9, 1919, plaintiff's Board of Directors authorized the payment of "* * * $30 a share bonus for the fiscal year ending Nov. 30, 1919, on the Employees' Profit-Sharing Stock, the profits of the business for this year authorizing said bonus of $30 a share under the provisions of the resolution of Aug. 12, 1916, under which said stock was issued, payable December 10th, 1919."

December 11, 1917, December 10, 1918, and December 9, 1919, plaintiff's stockholders adopted a resolution which in each instance read as follows:

> Resolved, that all of the acts and doings of the Directors of the Company since the last annual meeting thereof as they appear on the books of the corporation be and they are hereby in all respects ratified and confirmed by the stockholders.

13. For the year ended November 30, 1917, plaintiff accrued on its books separate items of "Dividends" and "Bonus" in the respective amounts of $279 and $1,380, and these separate items were either credited to amounts owing by the employes or paid to the employes during the following fiscal year. The amount of $1,380 was claimed as ordinary expenses and as deductions from gross income on plaintiff's return for the fiscal year ended November 30, 1917.

For the fiscal years ended November 30, 1918, and November 30, 1919, "Dividends" and "Bonus" were accrued on

plaintiff's books on the stock referred to in finding 11, as follows:

Employes	Year ended Nov. 30, 1918		Year ended Nov. 30, 1919	
	Dividends	Bonus	Dividends	Bonus
Hanes Brothers	$354.00	$1,770.00	$714.00	$3,570.00
S. B. Hanes.				
J. C. Hanes.				
John C. Hanes	6.00	----------	----------	----------
J. L. Warman	36.00	180.00	36.00	180.00
J. C. DeFreese	30.00	150.00	48.00	240.00
J. G. Robertson	48.00	240.00	138.00	690.00
W. C. Daniel	30.00	150.00	54.00	270.00
Z. F. Daniel	84.00	420.00	168.00	840.00
S. H. Morgan	36.00	180.00	54.00	270.00
W. W. Scott, Jr.	30.00	150.00	90.00	450.00
F. E. Hanna	6.00	30.00	24.00	120.00
M. C. Croft	30.00	150.00	114.00	570.00
J. R. Pickens	18.00	90.00	84.00	420.00
B. S. Sharp	----------	----------	12.00	60.00
W. R. Rumph	----------	----------	60.00	300.00
F. A. Yarbrough	----------	----------	18.00	90.00
John V. Freel	----------	----------	12.00	60.00
S. G. Jones	----------	----------	12.00	60.00
C. B. Pritchett	----------	----------	6.00	30.00
W. L. Foster	----------	----------	12.00	60.00
W. M. Johnson	----------	----------	12.00	60.00
Total	708.00	3,510.00	1,668.00	8,340.00
Unidentified error above	----------	----------	12.00	----------
Correct total	----------	----------	1,656.00	----------

14. The total of the separate items shown in the tabulation in the preceding finding as "Dividends" and "Bonus" in the respective totals of $708 and $3,510 which were accrued upon plaintiff's books for the fiscal year ended November 30, 1918, were either credited to amounts owing by the employes mentioned or paid to them during the following fiscal year. The amount of $3,150 was claimed as ordinary expenses and as a deduction from gross income upon plaintiff's return for the fiscal year ended November 30, 1918, but that deduction was disallowed by the Commissioner in his final determination of plaintiff's tax liability for that year.

15. The total of the separate items shown in finding 13 as "Dividends" and "Bonus" in the respective amounts of $1,656 and $8,340 for the fiscal year ended November 30, 1919, and which were accrued on plaintiff's books for that year were either credited to amounts owing by the employees or paid to them during the following fiscal year. The amount of $8,340 was claimed as ordinary expenses and as

a deduction from gross income on plaintiff's return for the fiscal year ended November 30, 1919, but such deduction was disallowed by the Commissioner in his final determination of plaintiff's tax liability for that year.

16. Although defendant does not concede that the "Dividends" or "Bonus" referred to in the preceding findings constituted a part of the salaries of the employees to whom they were paid, it is stipulated that should the court decide otherwise the salaries received by each of the employees mentioned during the fiscal years ended November 30, 1918 and 1919, including the payments for "Dividends" and "Bonus," as shown above, were severally reasonable.

17. Plaintiff kept its books and rendered its returns for the fiscal years ended November 30, 1918 and 1919, on the accrual basis.

The court decided that the plaintiff was not entitled to recover.

Madden, *Judge*, delivered the opinion of the court:

Plaintiff, a corporation, was assessed income and profits taxes for each of the fiscal years ending November 30, 1918, and November 30, 1919.

Of the 1918 tax $98,384.60 was paid in installments during 1919, leaving a balance of $5,930.68, of which balance $1,706.26 was paid September 28, 1926, and $4,224.42 was paid November 26, 1926.

Of the 1919 tax $44,634.47 was paid in installments during 1920, leaving a balance of $12,286.37, and this sum, together with a deficiency assessment of $11,270.97, a total of $23,557.34 was paid September 28, 1926. Plaintiff also paid on September 28, 1926, $638.61 as delinquent interest for 1918, and $4,289.18 as delinquent interest for 1919, and paid on November 26, 1926, $1,634.85 as delinquent interest for 1918.

Beginning on December 13, 1926, plaintiff filed seven separate formal claims for refund for 1918, and eight for 1919. Only three of the claims for each of these years relied upon the ground which, as is hereinafter shown, is the only ground for refund asserted in the amended petition upon which this suit is founded, viz., that certain payments to

employees should have been allowed to be deducted as compensation for services, and therefore, business expenses. Two such claims, one for each of the two years, were filed on December 13, 1926, and both were rejected by the Commissioner on August 3, 1927. Two such claims, one for each of the two years, were filed on October 11, 1929. The Commissioner treated these two claims as requests for reconsideration of his former rejection of the two claims of December 13, 1926, and closed a rather lengthy letter of April 11, 1930, with the statement

> In view of the above facts, it is the opinion of this office that the request for reopening * * * cannot be allowed and the applications are accordingly denied.

On October 10, 1931, plaintiff filed its original petition in this case. In that petition plaintiff recited in paragraph 2 that it had a just claim for refund of $29,488.02 paid by it in 1926 as income taxes for 1918 and 1919. It recited in paragraph 9, that it had, on September (sic) 15, 1929, filed a claim for refund of the entire amount, $29,488.02, paid by it in 1926 for the years 1918 and 1919, on the ground that the assessment and collection of these taxes had been barred by the statute of limitations. It recited in paragraph 11 of the petition that it had, on October 11, 1929, filed the claims for refund, hereinabove mentioned, for the entire sum paid in 1926 for the years 1918 and 1919, on the ground of the refusal to allow as deductions payments made to employees and claimed by plaintiff to be compensation for services.

Paragraph 14 of the original petition is as follows:

> That said sum is erroneously, illegally and wrongfully withheld from the claimant for the reason that, the aforesaid additional tax was wrongfully assessed against the claimant after the expiration of the statutory period of limitation within which such tax could lawfully be assessed; and for the further reason that, the tax paid in the year 1926 as aforesaid, was erroneously, illegally, and wrongfully collected from the claimant subsequent to the expiration of the statutory period of limitation within which such collection lawfully could be made, as provided by Sections 250 (d) of the Revenue Act of 1918 (40 Stat. 1057, 1083, c. 18), 250 (d) of the Revenue Act of 1921 (42 Stat. 227, 265, c. 136) and

277 (a) (2) of the Revenue Act of 1924 (43 Stat. 299, c. 234); and Sections 277 (a) (3) and 1106 (a) of the Revenue Act of 1926 (44 Stat. 58, 113, c. 27); and for the further reason that, such sum was collected under duress and without due process of law, the latter in violation of Sections 274 (a) and 283 of the Revenue Act of 1926 (44 Stat. 55, 63, c. 27) and the Fifth (Vth) Amendment to the Constitution of these United States.

Paragraph 15, the closing paragraph, contains formal recitals and a prayer for judgment for $29,488.02.

This court referred the case to a commissioner and a hearing was held in Atlanta, Georgia, October 19–20, 1933. At this hearing much evidence was presented relating to facts bearing on the question of whether the assessment and collection of the taxes paid by plaintiff in 1926 had been barred by the statute of limitations. Plaintiff also offered evidence intended to show that the payments made to employees, disallowed as deductions by the Commissioner of Internal Revenue, were compensation for services. Defendant objected on the ground that this evidence was not relevant to the claim stated in plaintiff's petition. The commissioner of this court ruled for defendant. Plaintiff stated that it intended to amend its petition to cover this issue. Defendant claimed that the petition could not be so amended, since to do so would not be merely amending the petition but stating a new cause of action on which the statute of limitations had run. The commissioner of this court, having no power over the question of amendment, in order to save the expense and inconvenience of a further hearing admitted the proffered evidence conditionally, the evidence to be considered if the amendment was made.

Plaintiff submitted no proposed findings of fact to the commissioner of this court, and did not amend its petition until after the commissioner had, on June 16, 1936, made his report to the court. Thereafter, on April 4, 1938, plaintiff filed its amended petition in which it asserted a claim against the defendant for $8,500, stating that it had filed the claims for refund hereinbefore mentioned of December 13, 1926, October 11, 1929, and September 27, 1930; and recited the action and failure to act of the Commissioner of Internal Revenue thereon.

Paragraph 23 of the amended petition is as follows:

> That said sum is erroneously, illegally and wrongfully withheld from the plaintiff for the reason (A) that the Commissioner erroneously failed, when computing the net income of the plaintiff for each of the taxable years 1918 and 1919, to allow as a deduction, as an ordinary and necessary expense paid or incurred during the respective taxable years in carrying on its trade and business, the amounts paid pursuant to the employees' stock profit sharing contracts, designated as dividends and bonuses to such employees, representing compensation for personal services actually rendered, which are allowed by paragraph (1) of subdivision (a) of section 234 of the Revenue Act of 1918; and (B) that the Commissioner, when computing the invested capital of plaintiff for the taxable year of 1919, erroneously reflected an amount for 1918 income and profits tax greater than the correct amount thereof, and contrary to article 845 (a) of Regulations 45.

Defendant demurred to the amended petition, one of its grounds being that the court was without jurisdiction because the amended petition was filed after the statute of limitations had run.

The demurrer was, on November 14, 1938, overruled, and the matter was again referred to the same commissioner of this court who, on April 11, 1940, filed a supplemental report relating to the evidence admitted conditionally at the 1933 hearing, and to the subject of an agreed statement of facts submitted by the parties.

The questions presented in the briefs and arguments of the parties are (1) whether the statute of limitations has run against plaintiff's claim, and (2) whether or not the payments made by the plaintiff to its employees were compensation for services and therefore deductible as business expenses, or were dividends paid to those employees as stockholders.

Our disposition of the first question makes it unnecessary to discuss the second.

In our opinion plaintiff did not bring its present suit until it had filed its amended petition on April 4, 1938. Its original petition filed in 1931, while it recited in an intermediate paragraph that claims for refund had been made

on the grounds now relied on by plaintiff, was specific, in paragraph 14 which we have recited, in stating the grounds upon which it claimed "that said sum is erroneously, illegally and wrongfully withheld" from the plaintiff. Neither this paragraph nor the petition as a whole contained any general language which could include the ground asserted in the amended petition and now exclusively relied on by plaintiff. See *United States* v. *Factors and Finance Co.*, 288 U. S. 89.

The cause of action relied on in the amended petition is in fact a new cause of action, and not a mere particularization of the old. See *United States* v. *Andrews*, 302 U. S. 517; *Lorenzen* v. *United States*, (D. C. W. D. Mo.) 41 F. (2d) 369, affirmed (C. C. A. 8) 52 F. (2d) 106 on the opinion of the trial court. If we should hold that the filing of the original petition here had in effect tolled the statute for the nearly seven years intervening before plaintiff stated the cause of action upon which it now relies, it would encourage just such dilatory conduct as occurred in this case. Here, even after the fact that the original petition did not include this ground of recovery was brought out at the hearing, and plaintiff indicated its purpose to amend the petition, and the commissioner of this court for that reason admitted plaintiff's evidence only conditionally, it waited nearly five years before amending. Indeed, if its contention is correct, it could have waited any number of years, so long as the case was pending on the original petition.

The case of *Untermyer* v. *Bowers*, (C. C. A. 2) 79 F. (2d) 9 is not in point. In that case, the claim that an allowed refund for one year had been applied by the Commissioner of Internal Revenue as a credit on taxes for another year whose taxes were barred by the statute of limitations, was made in the original petition. Plaintiff neglected to state facts showing that he had been properly entitled to the credits allowed him. His supplying those facts in his amended petition was an amplification of his original petition, and not the statement of a cause of action arising out of another and different ground.

Plaintiff asserted in its brief in opposition to the defendant's demurrer, however, that even if the amended petition

filed in 1938 were treated as an original petition, it was filed in time. It reasoned that because its claims for refund, filed with the Commissioner on September 27, 1930, have never been expressly rejected by the Commissioner, its right to sue continued and will continue until two years after the date of mailing by the Commissioner by registered mail of a notice of such rejection. See Revenue Act of 1932, section 1103 (a) (b), 47 Stat. 169, 286; Revenue Act of 1936, section 807 (a) (b), 49 Stat. 1648, 1745. Counsel for the defendant concede in their brief in support of defendant's demurrer that this would be the result "if, as alleged, refund claims were filed on September 27, 1930, and were still pending unrejected in the Bureau of Internal Revenue when that petition [the 1938 petition] was filed." Counsel for defendant then urge that the documents filed on September 27, 1930, were not "refund claims" because they were mere repetitions of the claims which had been filed in 1926 and rejected in 1927, and as to which an application to reconsider had been made and disallowed in 1929.

We agree with the defendant that the 1930 claims were not effective legal claims for refund and therefore were without legal significance. A taxpayer cannot keep his claim fresh indefinitely merely by repeating it. *B. Altman & Co.* v. *United States*, 69 C. Cls. 549. See also *Sugar Land Ry.* v. *United States*, 71 C. Cls. 628; *Hills, Executrix*, v. *United States*, 73 C. Cls. 128; *Pacific Mills Co.* v. *United States*, 4 Fed. Supp. 738. The case of *Jones et al* v. *United States*, 78 C. Cls. 549, does not establish a different doctrine. The Court there said (560–561):

> These cases announce the rule that when the Commissioner, upon application made by a taxpayer within the time in which suit could be instituted on a disallowed claim, enters into a reconsideration of the merits of the claim and later makes a decison thereon rejecting the claim or adheres to his former decision rejecting it, his decision for the purpose of the statute of limitations is in abeyance until he has reached and anounced his final decision and the taxpayer, under section 3226 of the Revised Statutes, has two years thereafter in which to institute suit. Whether there has been a reconsideration on the merits is a conclusion to be drawn from the acts of the Commissioner in response to the application

for reconsideration. There must be an actual reconsideration of the case, and the final decision must be upon the merits of the claim.

In this case there is no evidence that the Commissioner entered into a reconsideration of the case following the filing by the plaintiff of the documents of 1930. We, therefore, do not think that a claim for refund, as contemplated by the statute, stood unrejected after 1930. The provisions of section 1103 (b) of the Revenue Act of 1932 [1] make section 3226 of the Revised Statutes as it was before it was amended in 1932 the applicable statute. It provided that

> No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under duress or protest. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after such disallowance notify the taxpayer thereof by mail. (Revenue Act of 1924, sec. 1014, 43 Stat. 253, 343).

Plaintiff's amended petition, filed in 1938, being regarded as an original suit, is too late. It is eleven years after pay-

[1] Suits or proceedings instituted before the date of the enactment of this Act shall not be affected by the amendment made by subsection (a) of this section to section 3226 of the Revised Statutes. In the case of suits or proceedings instituted on or after the date of the enactment of this Act where the part of the claim to which such suit or proceeding relates was disallowed before the date of the enactment of this Act, the statute of limitations shall be the same as provided by such section 3226 before its amendment by subsection (a) of this section.

ment, where only five years are permitted; and nine years after rejection, when only two years are permitted.

Other questions raised in the briefs and argument we do not consider, since their resolution would not affect the result. We conclude, therefore, that the plaintiff's petition must be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

NATIONAL RUBBER MACHINERY COMPANY v. THE UNITED STATES

[No. 42614. Decided April 7, 1941]

On the Proofs

Income tax; basis for depreciation in reorganization.—Where plaintiff, a corporation formed for that purpose, acquired in exchange for its stock and for cash, all of the assets of three predecessor companies, and where less than 80 percent of the stock of plaintiff after the reorganization remained in the hands of the same persons, or any of them; it is *held* that under sections 113 and 114 of the Revenue Act of 1928 the basis for depreciation of the assets so acquired was their cost to plaintiff, and plaintiff is accordingly entitled to recover.

Same.—Where all of the assets of a corporation were acquired by plaintiff in exchange for plaintiff's stock and for cash, and where prior to receipt of said stock from plaintiff said corporation had made commitments for the sale of said stock, and did sell it later, it is *held* that said corporation was not a party to the reorganization under the provisions of the Revenue Act of 1928.

Same.—Where plaintiff in exchange for its stock and for cash acquired only a portion of the assets of a corporation and not substantially all of the properties of said corporation; it is *held* that said corporation was not a party to reorganization under the provisions of the Revenue Act of 1928.

The Reporter's statement of the case:

Hamel, Park and Saunders for the plaintiff. *Messrs. Charles D. Hamel, Lee I. Park, Lloyd G. Wilson*, and *C. F. Rothenburg* were on the briefs

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert A. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of Ohio, with its principal office in Akron, Ohio. It was organized for the purpose of acquiring and carrying on the business of five corporations, hereinafter sometimes for convenience referred to as the "transferor corporations," engaged in the manufacture and sale of rubber machinery.

2. On July 12, 1928, plaintiff acquired, as of April 1, 1928, the entire properties, assets, business, and goodwill of the Akron Rubber Mold & Machine Company, a corporation, the Banner Machine Company, a corporation, the DeMattia Brothers, Inc., a corporation, and DeMattia Foundry & Machine Company, a corporation (both hereinafter sometimes for convenience referred to collectively as the DeMattia Companies); and the entire property, assets, and goodwill, except the land, buildings, accounts, bills receivable, cash, and securities of the Kuhlke Machine Company, a corporation. These properties were acquired by payment to the respective corporations on the same date, to wit, July 12, 1928, of cash, issuance of plaintiff's no par value stock, and assumption of liabilities as follows:

Name of corporation	Cash	Plaintiff's shares of no par value stock	Liabilities assumed
To Akron Rubber Mold & Machine Co.	$489,092.90	12,000	$136,679.74
To Banner Machine Co.	499,818.00	4,000	38,924.50
To the Kuhlke Machine Co.	169,805.61	5,080	----------
To the DeMattia Cos.	365,529.16	11,000	59,873.08

3. The costs of assets received by plaintiff from each of said corporations, computed on the basis of cash paid, stock

issued at market value of $18⅞ per share, and liabilities assumed, were as follows:

Akron Rubber Mold & Machine Co.	$852, 272. 64
DeMattia Companies	633, 027. 24
Kuhlke Machine Co.	265, 690. 61
Banner Machine Co.	614, 242. 50

4. The allocation of the aforesaid costs to depreciable assets in the cases of the DeMattia Companies and of Akron Rubber Mold & Machine Company, and additions subsequent to July 12, 1928, are as follows:

Year and classification	Akron Rubber Mold & Machine Co.		De Mattia Cos.	
	Allocated cost	Additions	Allocated cost	Additions
Buildings:				
1928 acquisitions	$153, 057. 00		$174, 334. 97	
1928 additions		$52. 65		$5, 920. 06
1929 additions		16, 570. 87		85. 92
1930 additions		3, 240. 00		21, 339. 46
Machinery:				
1928 acquisitions	281, 568. 62		163, 224. 93	
1928 additions		24, 520. 72		11, 586. 57
1929 additions		56, 318. 19		4, 079. 72
1930 additions		13, 049. 03		2, 491. 65
Tools:				
1928 acquisitions	65, 708. 07		11, 322, 75	
1928 additions		1, 223. 04		292. 03
1929 additions		5, 848. 56		656. 22
1930 additions		1, 374. 00		20. 00
Automobiles:				
1928 acquisitions	1, 534. 47		1, 723. 89	
1928 additions		$882. 75		1, 400. 00
1929 additions		3, 126. 60		814. 53
1930 additions		817. 00		362. 50
Furniture and fixtures:				
1928 acquisitions	9, 054. 57		4, 917. 16	
1928 additions		398. 43		373. 12
1929 additions		709. 45		432. 95
1930 additions		473. 66		87. 50
Patterns:				
1928 acquisitions	35, 554. 57		10, 813. 12	
1928 additions		4, 361. 14		611. 50
1929 additions		5, 173. 51		413. 00
1930 additions		4, 665. 26		

5. The assets acquired by plaintiff from the said five transferor corporations had estimated average useful lives after April 1, 1928, as follows:

Description of assets:	*Estimated remaining useful life*
Buildings	28. 57 years
Machinery and equipment	16. 6 years
Tools and implements	3⅓ years
Furniture and fixtures	10 years
Automobile equipment	4 years
Patterns	4 years

6. The additions to the aforesaid assets had estimated remaining useful lives after the respective dates of acquisition as follows:

Description of assets:	*Estimated remaining useful life*
Buildings	40 years
Machinery and equipment	25 years
Tools and implements	4 years
Furniture and fixtures	10 years
Automobile equipment	4 years
Patterns	5 years

7. The depreciable assets acquired by plaintiff from the Akron Rubber Mold and Machine Company and the DeMattia Companies represented costs to those coporations as follows:

Name of transferor corporation:	*Costs to said corporations*
Akron Rubber Mold & Machine Co	$394, 355. 50
DeMattia Companies	259, 710. 85

8. The assets acquired by plaintiff from the said five transferor corporations had an aggregate fair market value as of the date of acquisition of $2,365,232.99 allocated to assets among the various corporations as follows:

Name of corporation from whom assets acquired	Depreciable assets	Other fixed assets (non-depreciable)	Current assets (non-depreciable)
Akron Rubber Mold & Machine Co	$546, 477. 30	$62, 438. 20	$243, 357. 14
DeMattia Companies	366, 236. 82	76, 923. 83	189, 866. 59
Kuhlke Machine Co	111, 554. 95	150, 000. 00	4, 135. 66
Banner Machine Co	417, 201. 57	6, 602. 87	190, 438. 06

9. At all times prior and subsequent to the transfer of the assets to the plaintiff corporation (i. e., to date of dissolution of the respective transferors), the stockholdings of the respective corporations were as follows: S. W. Harris and G. F. Hobach together owned all of the stock of the Akron Rubber Mold & Machine Company; M. D. Kuhlke and O. J. Kuhlke together owned all of the stock of the Kuhlke Machine Company; F. H. Groves and Elmer T. Coyle owned upwards of two-thirds of the stock of the Banner Machine Company; and Barthold and Peter DeMattia owned or controlled 80 percent of all of the stock of

DeMattia Brothers, Inc., and 95 percent of all of the voting stock of DeMattia Foundry & Machine Company. The balance of the stock of the Banner Machine Company and the DeMattia Companies was owned by other and disinterested parties.

10. The fair market value of plaintiff's no par value stock on July 12, 1928, was $18⅞ per share.

11. The aforementioned assets of the Akron Rubber Mold & Machine Company, Kuhlke Machine Company, DeMattia Brothers, Inc., the De Mattia Foundary & Machine Company, and the Banner Machine Company were acquired by plaintiff pursuant to contracts dated May 4, 1928, May 17, 1928, May 15, 1928, and May 4, 1928, respectively, between the majority stockholders of said corporations and one Francis Quinn. Said contracts were subsequently modified in minor respects not herein material, except that plaintiff's bond issue was definitely fixed at $1,350,000 par value.

12. The agreement between Quinn and Stanley W. Harris and G. F. Hobach, owners of all the stock of the Akron Rubber Mold & Machine Company, provided for the sale of the entire properties, assets, business and goodwill of said Akron Rubber Mold & Machine Company to plaintiff for cash, the assumption of liabilities and 12,000 shares of plaintiff's stock.

The agreement between Quinn and M. D. Kuhlke and O. J. Kuhlke, owners of all the stock of Kuhlke Machine Company, provided for the sale of only a portion of the assets of the Kuhlke Machine Company to plaintiff for cash and 5,080 shares of plaintiff's stock.

The agreement between Quinn and Barthold and Peter DeMattia, who owned or controlled 80 percent of all the stock of DeMattia Brothers, Inc., and 95 percent of all the voting stock of DeMattia Foundry & Machine Company, provided for the sale of the entire properties, assets, business and goodwill of said corporations to plaintiff for cash, the assumption of liabilities and 11,000 shares of plaintiff's stock.

The agreement between Quinn and F. H. Groves and Elmer T. Coyle, who owned approximately two-thirds of the stock of Banner Machine Company, provided for the sale of the entire properties, assets, and goodwill of the Banner

Machine Company to plaintiff for cash and 4,000 shares of plaintiff's stock.

13. Except for the provisions necessarily peculiar to each transferor, such as a description of parties, assets transferred, and consideration received, all of the agreements were similar in that each provided, among other things: that a corporation (plaintiff herein) would be formed with an authorized capital stock of 152,000 shares of common stock of no par value; that said corporation would issue first mortgage convertible 15-year Gold Bonds bearing interest at 6 percent per annum, payable semiannually, in an amount of approximately $1,300,000; that all of said agreements would be assigned to plaintiff in consideration for the issuance to said Quinn, as the promoter, of 15,000 shares of plaintiff's stock; that plaintiff would sell said bond issue to J. A. Sisto & Company, bankers, hereinafter sometimes called Sisto, for and in consideration of a payment of 90 percent of the par value thereof, and 35,000 shares of its common stock for the sum of $15.00 per share; and the shares of plaintiff's stock to be issued to the transferor corporations in part consideration for their assets, as aforesaid, would, at the request of Sisto, be deposited in escrow.

14. On June 4, 1928, in accordance with the provisions of the said four agreements, Francis Quinn entered into an agreement with plaintiff whereby he agreed to assign, and in fact did assign, to plaintiff the aforesaid agreements, and plaintiff agreed to carry out their provisions.

15. On June 29, 1928, Sisto entered into an agreement with plaintiff to purchase $1,300,000 of its bonds at 90 percent of the par value thereof, and 35,000 shares of plaintiff's common stock at $15.00 a share. The agreement further provided that, subject to the approval of counsel as to legal proceedings, Sisto would make a public offering of the bonds and of the stock not later than sixty days after the execution of said agreement. Said agreements were carried out in accordance with their terms.

16. Immediately upon receipt of the cash from the plaintiff on July 12, 1928, as aforesaid, each of the transferor corporations distributed the cash received by it to its individual stockholders.

17. The corporations whose assets were transferred to plaintiff on July 12, 1928, as aforesaid, were dissolved on the following dates, respectively:

Akron Rubber Mold & Machine Co	Dec. 17, 1928
Kuhlke Machine Co	Mar. 20, 1931
DeMattia Foundry & Machine Co	Nov. 27, 1928
DeMattia Brothers, Inc	Nov. 27, 1928
Banner Machine Co	Oct. 3, 1928

18. On June 26, 1928, Sisto entered into an agreement with Jerome B. Sullivan & Co. and E. F. Gillespie & Co., hereinafter called Sullivan and Gillespie, investment bankers with offices in New York City, for the sale to said investment bankers of 35,000 shares of stock of plaintiff. The terms of said agreement were embodied in a letter from Sisto to Sullivan and Gillespie, dated June 27, 1928, which is as follows:

> Confirming the agreement between us yesterday, we beg to advise you as follows:
>
> We have agreed to purchase, subject to the approval of counsel and other conditions usually contained in Bankers' contracts, $1,300,000 out of a total issue of $1,350,000 First Mortgage Convertible 6% Gold Bonds due July 1, 1943, of National Rubber Machinery Company, an Ohio Corporation, the issue being described more fully in the enclosed preliminary proof of circular.
>
> We have also agreed to purchase, subject to the same conditions, 35,000 shares of the Common Stock of this Company, which 35,000 shares of stock you have agreed to repurchase from us (when, as, and if we receive and accept the same) at $18.25 per share, payment to be made on the day of closing of our contract with the Company.
>
> In connection with your offering of the stock, you agree not to publicly offer the same in your initial advertisement at more than $22.75 per share and we are to have the right to withdraw 10,000 shares on the same terms that you offer the stock to other dealers. In connection with the Selling Group which we may form to distribute the bonds, we are to allot you, jointly, $200,000 face amount of bonds on the same terms that we allot the same to other Members of the Group.
>
> We also agree that you are to have an interest in our profits above 91, less expenses, in our sale of $100,000 face amount of said bonds, but the said last-mentioned

$100,000 of bonds are not to be delivered to you, but are to be sold by us.

We also agree to pay to you the sum of $5,000 to cover in part, your advertising expenses in connection with your public offering of the said stock, which payment is to be made upon demand by you, when, as, and if you are billed for said advertising.

19. The said stock and bonds were listed temporarily by Sullivan and Gillespie on the New York Curb Exchange on or about June 28, 1928. By July 12, 1928, Sisto, Gillespie, and Sullivan had made binding commitments for the sale to members of the public of said 35,000 shares of stock and $200,000 face value of bonds and had received payment in full therefor. By July 3, 1928, plaintiff's entire bond issue of $1,350,000 had been sold, and on July 5, 1928, Sisto & Company, by letter, advised the New York Curb Market Association that it (Sisto) would be ready to make delivery of the bonds in temporary form on July 12, 1928.

20. On June 30, 1928, Sisto & Company wrote the Banner Machine Company proposing to pay Banner Machine Company $2,000, or 50 cents a share, for an option to buy plaintiff's shares to be received by it within a period of sixty days at $24.00 a share, provided that Banner Machine Company escrow said shares on receipt thereof.

Said offer was accepted by the Banner Machine Company on or about July 2, 1928 (prior to July 12, 1928), and on that date (July 2, 1928), Sisto & Company sent the Banner Machine Company a check for $2,000 as the consideration for the option.

On July 10, 1928, Sisto & Company wrote E. F. Gillespie & Company advising that a 25 percent interest in said option had been allocated to Gillespie & Company and a 25 percent interest to Jerome B. Sullivan & Company. Said option was exercised by Sisto & Company, and 2,000 of said Banner shares were also subsequently sold by Sullivan and Gillespie.

21. Subsequent to September 10, 1928, the Banner stockholders retained no stock in plaintiff whatsoever.

22. Immediately after the issuance of its stock on July 12, 1928, plaintiff's total issued and outstanding stock con-

sisted of 82,080 shares and, subject to the agreements and commitments hereinabove described, were owned as follows:

Name of owner:	Number of shares owned
Akron Mold & Machinery Co.	12,000
Banner Machine Co.	4,000
Kuhlke Machine Co.	5,080
DeMattia Companies	11,000
J. A. Sisto Company, Bankers of New York	35,000
Francis Quinn, Promoter	15,000

23. Said 35,000 shares received by Sisto were on the same day, to wit, July 12, 1928, turned over to Sullivan and Gillespie, who paid Sisto $18.25 per share therefor from the proceeds of their public offering. The 35,000 shares were then distributed and delivered by Sullivan and Gillespie to the public in accordance with commitments theretofore made.

None of said shares was sold to any of the corporations whose assets were acquired by plaintiff, or their stockholders, nor did Gillespie, Sullivan or Sisto keep any of plaintiff's stock.

24. Immediately after the reorganization of the five companies permanent officers of the plaintiff were elected. Of these officers, S. W. Harris was president; Barthold DeMattia, Peter DeMattia, O. J. Kuhlke, Elmer T. Coyle, and F. H. Groves were vice presidents; M. D. Kuhlke was treasurer; G. F. Hobach was secretary; F. L. Haveron, of the same address as J. A. Sisto & Co., was assistant secretary and assistant treasurer. The directors of plaintiff were the above officers, together with Graham Adams of the Sisto address, and S. Stanwood Menken, attorney for Sisto.

25. On March 15, 1930, plaintiff filed with the Collector of Internal Revenue at Cleveland, Ohio, its income tax return for the calendar year 1929, showing a total income tax liability for the said year of $54,097.77, which amount was duly paid in installments as follows:

Date:	Amount
Mar. 20, 1930	$13,524.45
June 16, 1930	13,524.45
Sept. 13, 1930	13,524.45
Dec. 11, 1930	13,524.42

In said return for the year 1929 plaintiff took a deduction for depreciation of $90,392.42, as follows:

Kind of property	Previous nine months	Year 1929
Buildings	$12,970.93	$18,402.88
Machinery and equipment	50,802.73	66,637.64
Delivery equipment	2,246.67	3,103.71
Furniture and equipment	1,778.99	2,248.19
Total		90,392.42

26. On March 16, 1931, plaintiff filed with the Collector of Internal Revenue at Cleveland, Ohio, its income tax return for the calendar year 1930, showing a total income tax liability for said year of $11,651.82, which amount was duly paid in installments as follows:

Date:	*Amount*
March 19, 1931	$2,912.96
June 16, 1931	2,912.96
Sept. 15, 1931	2,912.95
Dec. 16, 1931	2,912.95

In said return for the year 1930 plaintiff took a deduction for depreciation of $81,747.34, as follows:

Kind of property	Previous years	Year 1930
Buildings	$31,373.81	$17,629.48
Machinery and equipment	117,441.37	59,089.90
Furniture and fixtures	4,027.18	1,940.48
Delivery equipment	5,350.38	3,087.48
Total		81,747.34

27. In these returns plaintiff computed depreciation on the basis of cost to its predecessor companies.

28. On October 5, 1931, plaintiff filed with the Collector of Internal Revenue at Cleveland, Ohio, a claim for refund for the calendar year 1929, in which it asked for the refund of $54,097.77, upon the ground, among others, that depreciation on its assets should be on the basis of the cost to it of those assets.

On March 6, 1933, plaintiff filed with the said Collector a claim for refund for the calendar year 1930, in which it asked for the refund of $11,651.82 upon the same ground

with respect to depreciation as that contained in the claim for 1929.

29. On March 12, 1932, the Commissioner of Internal Revenue determined and allowed a refund to the plaintiff for the calendar year 1929 in the amount of $2,963.59, and he determined and allowed a refund to plaintiff for 1930 in the amount of $4,535.35.

The balance of the claim for refund for the year 1929 was disallowed on a schedule dated March 12, 1932, and the balance of the claim for refund for the year 1930 was disallowed on a schedule dated June 28, 1933, notice of which was mailed to plaintiff by registered mail on June 29, 1933.

30. In his determination of plaintiff's tax liability for 1929 and 1930, as aforesaid, the Commissioner of Internal Revenue computed plaintiff's depreciation, (1) with respect to assets acquired from the Banner Machine Company and the Kuhlke Machine Company on the basis of the cost thereof as reflected by the aggregate of cash and fair market value of stock paid and issued therefor, and the liabilities assumed in respect thereto; and (2) with respect to assets acquired from the DeMattia companies and the Akron Rubber Mold & Machine Company on the basis of the cost thereof to said predecessor corporations as shown on the latter's books. The depreciation allowed for each year is as follows:

Corporation	Depreciation on assets acquired from each (plus additions)	
	1929	1930
Banner Machine Co	$49,740.37	$41,142.18
Kuhlke Machine Co	15,950.48	16,033.80
Akron Rubber Mold & Machine Co	38,140.27	40,295.00
DeMattia Brothers, Inc	13,927.78	12,946.46
DeMattia Foundry & Machine Co	7,835.23	7,681.18
Total	125,594.13	118,098.62

The court decided that the plaintiff was entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The question in this case is the proper basis for the computation of depreciation on certain assets acquired by the

plaintiff from the Akron Rubber Mold and Machine Company, DeMattia Brothers, Inc., and DeMattia Foundry & Machine Company.

These assets were acquired under these circumstances: In the early part of 1928 one Francis Quinn approached each of the three above companies, and also the Banner Machine Company and the Kuhlke Machine Company, with proposals for the transfer of their assets to a corporation to be organized, the plaintiff in this case. Contracts were entered into between him and each of these five companies, under which they agreed to convey all of their assets to this corporation for a certain amount in cash, the assumption of their liabilities, and the issuance to them of a certain number of shares of plaintiff's stock, except that the contract with the Kuhlke Machine Company provided for a transfer of only a portion of its assets to plaintiff, and none of its liabilities were assumed. Plaintiff was to have an authorized capital of 152,000 shares of common stock of no par value. 15,000 shares of it were to be issued to Francis Quinn for his services, and 35,000 shares were to be sold to J. A. Sisto & Company, bankers, at $15.00 a share. The plaintiff was also to issue $1,300,000 of first mortgage six percent bonds, which were to be sold to J. A. Sisto & Company at 90 percent of their par value.

Pursuant to these agreements, a total of 82,080 shares of plaintiff's stock were actually issued, 12,000 to the Akron Rubber Mold & Machine Company, 11,000 to the DeMattia companies, 4,000 to Banner Machine Company, 5,080 to Kuhlke Machine Company, 15,000 to Francis Quinn, and 35,000 to J. A. Sisto & Company.

The Commissioner of Internal Revenue held that this transaction was a reorganization, and that the proper basis for depreciation of the assets received from the Akron Rubber Mold & Machine Company and the two DeMattia companies was the cost of those assets to those companies, and not to the plaintiff. But, on the contrary, he held that the proper basis for the assets received from the Banner Machine Company and the Kuhlke Machine Company was their cost to plaintiff, or, in the absence of proof of cost, their market value at the time plaintiff acquired them.

This, he held, was for the reason that neither the Banner Machine Company nor Kuhlke Machine Company was a party to the reorganization. The Banner Machine Company was not a party to the reorganization because prior to the time it received the stock from the plaintiff it had made commitments for the sale of it and, in fact, did later sell it; the Kuhlke Machine Company was not a party to the reorganization because the plaintiff did not acquire "substantially all of the properties of the company."

The assets of these companies being eliminated, the controversy is over the proper basis for depreciation of the Akron and DeMattia assets. The defendant says that this basis is their cost to the Akron and the DeMattia companies, for either one of two reasons: *first*, because the transaction was one described in section 112 (b) (4) and 112 (d) (1) of the Revenue Act of 1928 (45 Stat. 791, 816, 817); or, *second*, it comes within one of the two exceptions to the general rule set out in subparagraphs (7) and (8) of section 113 (a) of said act. The plaintiff says that cost to it is the proper basis.

It seems clear that the transaction is one such as is described in section 112 (b) (4) and 112 (d) (1). Section 112 (b) (4) provides:

> No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

Section 112 (d) (1) makes this section applicable, even though property or money, in addition to stock, be exchanged for other property, provided such property or money be distributed in pursuance to the plan of reorganization. The transaction here clearly was a reorganization, and the money received by the plaintiff's predecessors was distributed by them pursuant to the plan of reorganization, and the above-quoted sections, therefore, are applicable.

From this premise the defendant argues that since these sections provide that no gain or loss is recognized as the result of such a transaction, the proper basis for computing depreciation on the property received must be its basis in the hands of the transferor. This probably would follow,

except for the fact that the method for computing depreciation in a transaction such as we have here is expressly provided for in sections 113 and 114.

Section 114 makes the basis for computing depreciation the same as the basis for computing gain or loss, and section 113 fixes cost as the ordinary basis for computing gain or loss on property acquired after February 28, 1913; but it sets out twelve exceptions to this general rule. Exception number (6) provides that if property was acquired in the manner this property was acquired, "the basis shall be the same as in the case of the property exchanged." This seems to support defendant's position; but the section concludes—

> This paragraph shall not apply to property acquired by a corporation by the issuance of its stock or securities as the consideration in whole or in part for the transfer of the property to it.

Thus we see that while this section is applicable to the corporation transferring its property for stock, it is expressly made inapplicable to the corporation issuing its stock for property.

The case of the latter corporation, the one receiving property for its stock, is taken care of in the succeeding paragraphs. Paragraph (7), immediately following the above-mentioned paragraph, provides that the basis for the property received for stock in a reorganization shall be the same as it would be in the hands of the transferor, but only in the event that "immediately after the transfer an interest or control in such property of 80 per centum or more remained in the same persons or any of them." If such interest or control did not remain in such hands, then, of course, the general rule applied, to wit, cost.

In subparagraph (8) another case is described where cost to the seller is not the proper basis. This is where property is transferred by one or more persons to a corporation solely in exchange for its stock or securities and where immediately after the exchange the persons transferring the property are in control of the corporation in substantially the same proportion as their former interests in the property transferred. (The defendant concedes that for this section to be applicable, as well as subsection (7), the

transferors must have not less than an 80 percent interest or control in the transferee corporation.)

These are the only two exceptions that could have any application to the transaction in the case at bar. In all other cases section 113 expressly says that cost to the purchaser shall be the basis. Unless, therefore, 80 percent interest or control remains in the same persons after the transfer, the proper basis is the cost to the plaintiff, and not cost to the persons who transferred the property to plaintiff. The question to be answered, therefore, is, did this 80 percent or more remain in the hands of the same persons.

The total number of shares issued was 82,080. Eighty percent of this is 65,664 shares. It is conceded that the 23,000 shares issued to the Akron and the two DeMattia companies are to be counted in reckoning this 80 percent. On the other hand, it is conceded that the shares issued to the Kuhlke Machine Company are not to be counted, because the plaintiff did not acquire substantially all the property of that company; and it is also conceded that the shares issued to the Banner Machine Company are not to be counted because of the fact that prior to its receipt of these shares the Banner Machine Company had entered into a binding option to sell them, and because the option was later exercised and the shares were in fact sold.

This latter concession was in accord with the decision of the Sixth Circuit Court of Appeals in *Banner Machine Co.* v. *Routzahn*, 107 F. (2d) 147; certiorari denied, 309 U. S. 676; rehearing denied, 310 U. S. 656. It was there held, under the precise facts here, that, insofar as this company was concerned, the transaction then under review was "nothing but the purchase of appellant's assets." The court said:

> It is true that in addition to cash, stock was received; but the purpose to reduce that stock to cash was clearly shown by the giving of the option to the underwriter for the sale of the stock prior to the receipt thereof. Appellant in effect discounted the stock for cash. The two corporations in fact did not contemplate a reorganization, merger or consolidation.

This reduces the controversy to the 35,000 shares of stock issued to J. A. Sisto & Company. The plaintiff says that

these also ought to be excluded from consideration on the same theory the Banner shares were excluded, because Sisto & Company also had entered into a binding obligation to sell these shares prior to the time they received them. The facts are that prior to the reorganization J. A. Sisto & Company, through their associates Jerome B. Sullivan & Company and E. F. Gillespie & Company, had entered into binding commitments with members of the public for the sale of all of said 35,000 shares of stock, and all of the bonds which Sisto & Company had agreed to purchase; and immediately after the reorganization these stocks and bonds were in fact sold to the public, and Sisto & Company had no further interest therein. (See finding 19.) It is true that immediately after the issuance of plaintiff's stock Sisto & Company did own 35,000 shares, but they owned them under a binding agreement to sell them immediately. As was said by the Ninth Circuit Court of Appeals in *Commissioner* v. *Schumacher Wall Board Corp.*, 93 F. (2d) 79, 81—

> * * * the series of transactions must be viewed as a unit, and the ownerships of 80 per cent interest compared at the beginning and end of the consummation of the entire plan.

So viewing the transaction, and on the authority of the cases cited, these shares must be excluded in determining whether or not 80 per cent control remained in the hands of the same persons.

Deducting these 35,000 shares from the total shares issued, leaves only 47,080 shares, which is considerably less than the 80 per cent fixed by the statute.

It results that plaintiff is correct in saying the proper basis for the assets in question is their cost to it.

Entry of judgment will be deferred until the filing of a stipulation by the parties, or, in the absence of such stipulation, until the incoming of a report of a commissioner showing the amount due plaintiff in accordance with this opinion. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

Syllabus

JOHN WANAMAKER PHILADELPHIA, A CORPORATION, v. THE UNITED STATES

[No. 42700. Decided April 7, 1941]

On the Proofs

Income tax; consolidated return; deduction of loss of affiliate.—Where during the entire fiscal year of plaintiff ending January 31, 1929, the entire capital stock of plaintiff was owned by an individual, or his estate, which from February 1, 1928, to June 30, 1928, also owned 96.5% of the stock of another corporation; and where said affiliated corporation showed a net operating loss for 1928; it is *held* that plaintiff was entitled, in its income-tax return for the fiscal year ending January 31, 1929, to deduct the losses of affiliate incurred in 1928 on the proportional basis provided in section 105 of the Revenue Act of 1928, and plaintiff is entitled to recover.

Same; debts ascertained to be worthless or charged off.—Where evidence produced by plaintiff is not sufficient to establish that certain debts of affiliate were definitely ascertained to be worthless during the period from February 1 to June 30, 1928, which was the period of affiliation, or that said debts were charged off during that period, it is *held* that plaintiff is not entitled to the claimed deduction for said debts and is not entitled to recover.

Same; stocks liquidated.—Where plaintiff in its 1929 return claimed a deduction on account of "stocks liquidated," and where said stocks admittedly became worthless in 1929; it is *held* that the cost price of said stocks acquired in 1922 and in later years having been satisfactorily proved, plaintiff was entitled to the claimed deduction and is entitled to recover.

Same; losses on liquidation of affiliate.—Where plaintiff in its consolidated income-tax return for its fiscal year ending January 31, 1923, had been allowed as a deduction the operating loss of an affiliated corporation; and where in the instant suit plaintiff asserts a claim for deduction as a loss the difference between the value of its proportionate share of the assets of said corporation at the time said assets were turned over to the trustee for liquidation in 1922 and its share of the proceeds of such liquidation in 1929; it is *held* that the liquidation of said affiliated corporation was not completed in 1922 but in 1928, and plaintiff is not entitled to the deduction claimed, as above, in 1929.

Reporter's Statement of the Case

Same.—Under the doctrine of *Ilfeld Co.* v. *Hernandez*, 292 U. S. 68, taxpayer, having had the benefit of a loss on account of an affiliated company in a prior year, must subtract that loss from any loss suffered in a later year on account of the liquidation of its interest in that affiliate, and can claim a deduction only for the excess loss, if any.

The Reporter's statement of the case:

Mr. James O. Wynn for the plaintiff. *Messrs. J. Marvin Haynes*, *Robert H. Montgomery*, and *George G. Blattmachr* were on the briefs.

Mr. Daniel F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is a corporation organized and existing under the laws of the State of Pennsylvania, with its office and principal place of business in Philadelphia, Pennsylvania.

2. At the time and in the manner required by law, plaintiff filed a consolidated income-tax return for the fiscal year ended January 31, 1929, showing a tax of $392,867.33. Pursuant to Public Resolution No. 23, 71st Congress, approved December 16, 1929, $2,728.24 of said tax was abated. Payments of the remaining tax of $390,139.09 were made as follows:

April 15, 1929	$98, 216. 83
July 16, 1929	98, 216. 84
October 16, 1929	98, 216. 83
January 16, 1930	95, 488. 59
Total	390, 139. 09

3. Reported in the consolidated income-tax return for the fiscal year ended January 31, 1929, were the net incomes and/or losses of certain corporations all of the stock of which during all of said fiscal year was owned by the plaintiff. Also reported in said consolidated return were the net operating losses therein claimed to have been sustained by the Record Publishing Company, a corporation of the State of Pennsylvania, during the period from February 1, 1928, to June 30, 1928.

4. From February 1, 1928, to June 30, 1928, 7,722 shares of the 8,000 shares outstanding of the stock of the Record Publishing Company were owned by Rodman Wanamaker and/or the Estate of Rodman Wanamaker. Rodman Wanamaker and/or the Estate of Rodman Wanamaker owned all of the stock of the plaintiff. From February 1, 1928, to April 1, 1928, plaintiff owned 170½ shares of the stock of the Record Publishing Company, and on April 1, 1928, acquired by purchase an additional 107½ shares. The total of 278 shares was held by the plaintiff until June 30, 1928. On June 30, 1928, the stock of the Record Publishing Company was sold to outside interests by plaintiff and by the Estate of Rodman Wanamaker.

5. Upon an audit of the consolidated income-tax return, the Commissioner of Internal Revenue determined that the Record Publishing Company should be excluded from the consolidated return for the fiscal year ended January 31, 1929, and that the total net operating loss of $186,277.15 claimed to have been sustained by the Record Publishing Company was not a proper deduction in computing the consolidated net income of the plaintiff and its affiliated companies upon the ground that the Record Publishing Company was not affiliated with the plaintiff during the fiscal year ended January 31, 1929, within the meaning of the pertinent provisions of the Revenue Act of 1928. Thereafter the Commissioner of Internal Revenue assessed an additional tax of $25,342.67 as the result of said determination and certain other adjustments. Said additional tax of $25,342.67, together with interest amounting to $3,315.38, was paid on July 7, 1931.

6. On or about September 17, 1931, plaintiff filed a claim for refund of $22,198.02 together with interest, with the Collector of Internal Revenue at Philadelphia, Pennsylvania, asserting that the Commissioner of Internal Revenue had improperly disallowed the deduction of the Record Publishing Company's alleged total net operating loss of $186,277.15 from plaintiff's consolidated net income for the fiscal year ended January 31, 1929. On October 31, 1933, the Commissioner of Internal Revenue rejected this claim for refund.

7. During the period from February 1, 1928, to June 30, 1928, the operating loss of the Record Publishing Company

was $133,729.86. This sum does not include the bad debts on which plaintiff claims additional deductions, referred to in the next finding.

8. During the months of April, May, and June, 1928, while the negotiations were taking place for the sale of the stock of the Record Publishing Company to the purchasers referred to in finding 4, the accountants representing the Record Publishing Company and the purchasers of that company made an examination of certain accounts receivable on the books of the Record Publishing Company. As a result of that investigation, they listed as worthless accounts in the amount of $40,981.12, basing such determination on the consideration that some of the accounts had previously given trouble with respect to collections and that a change in ownership might adversely affect the collection of some of the accounts. The amount of the accounts thus shown as worthless was reflected in a balance sheet memorandum as of June 30, 1928.

9. On November 12, 1931, plaintiff filed a claim for refund of $3,308.76, for the fiscal year ended January 31, 1929, based on the ground that it was entitled to an annual deduction of $27,765.81 on account of amortization of leaseholds in New York. While this refund claim was under consideration by the Bureau of Internal Revenue, suit was instituted by the plaintiff on the claim referred to in finding 6, for the same fiscal year, and on August 12, 1935, the Bureau notified plaintiff that suit involving the fiscal year ended January 31, 1929, having been instituted, the claim for refund would be rejected. On or about January 1, 1934, the plaintiff and the Treasury Department entered into an agreement that plaintiff should be entitled to an annual deduction for amortization of leaseholds in the amount of $13,639.79. Defendant concedes that plaintiff is entitled to a deduction of $13,639.79, for the fiscal year ended January 31, 1929, on account of amortization of leaseholds.

10. In its consolidated income-tax return for the year ended January 31, 1923, plaintiff claimed an operating loss for the Emerson Piano Company, an affiliate of plaintiff, in the amount of $381,844.96. This operating loss after negotiations with the Bureau of Internal Revenue was determined to be

$216,844.96, and that amount was allowed in determining plaintiff's tax liability for the year ending January 31, 1923.

11. In 1918 the plaintiff purchased 4,357 shares of stock of the Emerson Piano Company at a cost of $276,135.04. During the period from March 31, 1922, to September 28, 1922, plaintiff purchased 2,344 additional shares of such stock at a cost of $58,600. Plaintiff then owned 6,701 shares of the outstanding 8,435 shares of the Emerson Piano Company, for which it had paid $334,735.04.

12. On March 31, 1922, plaintiff entered into an agreement with J. Harry Shale and J. H. Williams, whereby said Shale and Williams agreed to purchase all of the stock and all of the assets of the Emerson Piano Company, with the exception of accounts receivable, real estate, and cut timber in the State of Maine. The said Shale and Williams agreed to deliver in payment of said stock and assets $100,000 of the preferred stock of a corporation to be organized and to be called the United Piano Company, and also the sum of $128,861.56.

13. On April 3, 1922, the Emerson Piano Company assigned to plaintiff as trustee for the stockholders of the Emerson Piano Company all of its assets, with the exception of those which were to be transferred to Shale and Williams under the contract of March 31, 1922, and authorized the plaintiff as such trustee to pay all liabilities of the Emerson Piano Company to March 31, 1922, from the proceeds of the assets transferred to plaintiff as trustee and to distribute the residue pro rata among the stockholders of the Emerson Piano Company. The plaintiff liquidated the assets transferred to it, paid the debts of the Emerson Piano Company, and distributed the balance among the stockholders of the Emerson Piano Company. The liquidation of said assets into cash continued from April 7, 1922, until sometime in December 1928.

14. Pursuant to the contract of March 31, 1922, Shale and Williams paid the sum of $128,861.56 and 1,000 shares of preferred stock of the United Piano Company of the par value of $100 each. The 1,000 shares of the United Piano Company stock were not delivered to plaintiff as trustee, but were distributed among the former stockholders of the Em-

erson Piano Company pro rata. As its share of the preferred stock of the United Piano Company plaintiff received in May 1922, 794.4273 shares. At the time this stock was not quoted on the market, but it was being bought and sold at $100 per share. From May 11, 1922, to January 24, 1924, plaintiff made additional purchases of the preferred stock of the United Piano Company in a total of 82.5727 shares at $100 per share. Its fair market value in 1922 was $100 per share.

15. The plaintiff as trustee, after paying the liabilities of the Emerson Piano Company, distributed among the former stockholders of the Emerson Piano Company the remaining proceeds of the assets of the said company, together with the sum of $128,861.56, heretofore referred to, which it received as such trustee from Shale and Williams. The pro rata share of plaintiff of such distributions was received by it on the dates and in the amounts as follows:

January 3, 1923	$67,010.00
June 6, 1923	33,505.00
October 3, 1923	16,752.50
December 15, 1923	16,752.50
January 19, 1924	26,804.00
November 10, 1924	6,701.00
August 4, 1925	6,701.00
February 9, 1928	8,640.29
Total	182,866.29

After the last payment of February 9, 1928, shown above, and before January 31, 1929, plaintiff ascertained that it would receive no further distributions from the assets of the Emerson Piano Company, which it had received as trustee, because the remaining assets, consisting of accounts, were sold at public auction, and there was nothing left to be distributed among the stockholders.

16. The United Piano Company went into bankruptcy and was placed in the hands of receivers early in the year 1928. In December 1928 the receivers made a report to plaintiff that the proceeds of the United Piano Company would produce no more than approximately 40 percent for the creditors, and that the stockholders would receive nothing.

17. In its consolidated income-tax return for the fiscal year ended January 31, 1929, the plaintiff claimed as a deduc-

tion in Schedule B, as "Stocks Liquidated," the sum of $160,-126.02. This deduction consisted of the value of the 794.4273 shares of preferred stock and of the 82.5727 shares of preferred stock of the United Piano Company, acquired and valued as shown in Finding 14, totalling $87,700; and the sum of $72,426.02, being the difference between $334,735.04, the cost to plaintiff of the 6,701 shares of stock in the Emerson Piano Company owned by it in 1922 (Finding 11), and $262,-309.02 made up of the value of the 794.4273 shares of stock received by plaintiff in 1922 from the United Piano Company plus the $182,866.29 received by plaintiff from the sale of assets of the Emerson Piano Company (Finding 15).

18. In the consolidated income-tax return filed by plaintiff for the fiscal year ended January 31, 1929, there was reported in Schedule L, "Reconciliation of Net Income and Analysis of Changes in Surplus," under Item 2, "Nontaxable income: (a) Interest on obligations of a State, Territory, or any political subdivision thereof, or the District of Columbia," the sum of $17,328.96. Of this sum $477.50 represented interest received on New York City corporate stock of the face value of $11,500, and the balance of $16,851.46 represented the discount allowed by the City of Philadelphia to the plaintiff on the prepayment of taxes due to that City.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is based on two claims for refund of corporation income taxes for the fiscal year ended January 31, 1929. The first claim filed September 17, 1931, was for $22,198.02, and arose out of the Commissioner of Internal Revenue's disallowance of a deduction in plaintiff's consolidated corporation income tax return for the fiscal year in question, of a loss by the Record Publishing Company, hereinafter called Record. Defendant concedes that Record had a loss of $133,-729.86. Plaintiff claims the loss was $40,981.12 more than that. But the first question to be answered is whether plaintiff was entitled to deduct any loss of Record, regardless of its amount.

During plaintiff's entire fiscal year ending January 31, 1929, plaintiff owned all the stock of several corporations other than Record. Rodman Wanamaker, an individual, or his estate, owned all the stock of plaintiff during the entire year, and from February 1, 1928, to June 30, 1928, owned 96.5% of the outstanding stock of Record. Between February 1 and June 30, 1928, plaintiff owned a varying number of shares of Record stock, 278 at the latter date. On that date all the stock of Record held by Rodman Wanamaker's estate and by plaintiff was sold to outside interests.

The affiliation of plaintiff and Record was, then, the result of the ownership by Rodman Wanamaker, or his estate, of all of the stock of plaintiff and 96.5% of the stock of Record, i. e. the stock of both plaintiff and Record was owned by "the same interests." This has come to be called a class B affiliation. On the other hand, the affiliation between plaintiff and the other corporations whose stock plaintiff owned directly has come to be known as a class A affiliation.

The Revenue Act of 1928, 45 Stat. 791, provided in section 142 that corporations affiliated by either class A or class B affiliations could file consolidated returns for the taxable year 1928. In section 141 it provided, for the taxable year 1929 and subsequent years, a different definition of affiliation, and limited the privilege of filing consolidated returns for those years to corporations with class A affiliation.

The "taxable year" here in question is by the definition of the statute, 1929. Section 48 of the Revenue Act of 1928 is as follows:

> SEC. 48. Definitions
>
> When used in this title—
>
> (a) Taxable year.—"Taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under this Part. "Taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1928, shall be the calendar year 1928, or any fiscal year ending during the calendar year 1928.

(b) Fiscal year.—"Fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. (45 Stat. 791, 807)

Plaintiff, conceding that the class B affiliation which it had with Record did not entitle it to file a consolidated return, including Record, for its full fiscal year extending into 1929, urges that it had the privilege, under section 105 of the Revenue Act of 1928,[1] of filing a return for its fiscal year ending January 31, 1929, which included Record as an affiliate as defined in section 141 (d), and then computing its tax proportionately, eleven-twelfths on the basis of the inclusion of Record, and one twelfth on the basis of its exclusion.

Defendant urges that section 105 is not applicable; that its scope is limited to the computation of taxes when an authorized return has been made; that by the definition of "taxable year" in section 48, and the withdrawal, by section 141, of the privilege of filing a consolidated return including a class B affiliate, for the "taxable year" 1929 and thereafter, Congress has determined the question adversely to plaintiff.

It should be noted that under Article 735 of Regulations 74[2] (1929) there was extended to corporations affiliated on

[1] SEC. 105. If it is necessary to compute the tax for a period beginning in one calendar year (hereinafter in this section called "first calendar year") and ending in the following calendar year (hereinafter in this section called the "second calendar year") and the law applicable to the second calendar year is different from the law applicable to the first calendar year, then the tax under this title for the period ending during the second calendar year shall be the sum of: (1) the same proportion of a tax for the entire period, determined under the law applicable to the first calendar year and at the rates for such year, which the portion of such period falling within the first calendar year is of the entire period; and (2) the same proportion of a tax for the entire period, determined under the law applicable to the second calendar year and at the rates for such year, which the portion of such period falling within the second calendar year is of the entire period (45 Stat. 791, 815).

[2] In the case of a consolidated return of affiliated corporations, the consolidated net income must be computed on the basis of the taxable year (calendar year or fiscal year) of any one of the affiliated corporations, except, if the affiliated group of corporations has a parent corporation, the consolidated net income must be computed upon the basis of the taxable year of the parent corporation. However, if the corporations properly made a consolidated return for the taxable year 1927, the consolidated net income for the taxable year 1928 must be computed on the basis of the same taxable year upon which the 1927 return was made, unless permission to change is granted by the Commissioner. If pursuant to this article the taxable year of a group of corporations affiliated under the provisions of section 142 (c) (2) would be a fiscal year beginning in 1928, a consolidated return for a fractional part of a year may be filed by such affiliated corporation for the period between the close of the previous fiscal year of the group and December 31, 1928. In such cases the period beginning January 1, 1929, shall be included in the return or returns for the taxable year 1929.

a class B basis the privilege of filing a consolidated return for 1928, which return could include the months of their fiscal year falling within 1928, in order that such corporations might have the advantage of the losses of any corporation within the group in that return. Since plaintiff's group of corporations, was, except for Record, a class A group, it did not fall within the permission of this regulation. Defendant argues that plaintiff could have taken advantage of the regulation by filing a return including only itself and Record, a class B affiliate, for the eleven months of 1928. We think it doubtful whether, under the language of the regulation, plaintiff could have done so, but even if it could, it would have been obliged to forego the advantages of a consolidated return including its several class A affiliates.

Plaintiff urges that it was the intent of Congress, when in May, 1928, it changed the law relating to consolidated returns of affiliated corporations, to give taxpayers until the end of the year 1928 to adjust themselves to the new law. It points to the recommendation of the Joint Committee on Internal Revenue Taxation, which is referred to in the Report of the Senate Finance Committee, 70th Congress, 1st session, S. Rept. 960, page 13. The recommendations of the Joint Committee were, in part, as follows:

> 3. That affiliation be confined to so-called Class A affiliations by repealing Clause (2) of Section 240 (d) which provides that two or more domestic corporations shall be deemed to be affiliated if at least 95 per cent. of the stock of two or more corporations is owned by the same interests.
>
> 4. That a reasonable interval of time be given affiliated corporations to adjust themselves to this change. It is suggested that these amendments should not take effect before January 1, 1929. (Report November 15, 1927, Vol. I, p. 14.)

While the legislative intent is not clear, we think that, giving the taxpayer the benefit of the ambiguity, section 105 should be construed to permit plaintiff to compute its taxes as it seeks to do. The general purpose of Congress not to penalize a taxpayer using a period other than a calendar year

as his tax period seems plain, and the substantial question in controversy here is whether plaintiff, because of the peculiar facts of its relation to the companies in its group, should be so penalized. We conclude that plaintiff is entitled to deduct Record's losses incurred in 1928, on the proportionate basis provided in section 105.

Plaintiff claims that the deductible losses of Record in 1928 were $174,710.98. Defendant concedes losses of $133,729.86. The $40,981.12 left in dispute represents the amount of certain debts which plaintiff claims were ascertained to be worthless and were charged off between February 1 and June 30, 1928. Prior to the sale which was made of the stock of Record on June 30, 1928, to outside interests by plaintiff and the estate of Rodman Wanamaker, accountants representing Record and the purchaser went through the accounts receivable on the books of Record and made a memorandum listing the names and ledger page numbers of accounts totaling $40,981.12 which they listed as worthless, basing such determination on the consideration that some of the accounts had previously given trouble with respect to collections and that a change in ownership might adversely affect the collection of some of the accounts. The amount of the accounts thus shown as worthless was reflected in a balance sheet memorandum as of June 30, 1928. Section 23 (j) of the Revenue Act of 1928 provided:

> In computing net income there shall be allowed as deductions:
>
> (j) Bad debts. Debts ascertained to be worthless and charged off within the taxable year (or, in the discretion of the Commissioner, a reasonable addition to a reserve for bad debts); and when satisfied that a debt is recoverable only in part, the Commissioner may allow such debt to be charged off in part. (45 Stat. 791, 800.)

We are not satisfied by plaintiff's meagre evidence relating to these debts that they were ascertained to be worthless during the period from February 1 to June 30, 1928, or that they were charged off during that period. We conclude therefore that the allowable deduction for Record's losses is $133,729.86.

Defendant claims several items of set-off. In plaintiff's

1929 return it claimed a deduction of $160,126.02 on account of "stocks liquidated." As to $87,700 of this amount, it represents the cost, as claimed by plaintiff, of 877 shares of preferred stock of the United Piano Company, most of which was acquired by it in 1922 as a part of the consideration paid by two persons named Shale and Williams, when they bought all of the stock and most of the assets of the Emerson Piano Company from the latter's stockholders, plaintiff being the majority stockholder of the Emerson Company. At the time plaintiff received this stock, it was, though not listed on any market, being bought and sold at $100 a share. Plaintiff, from May 11, 1922, to January 24, 1924, purchased some eighty additional shares at $100 each. Plaintiff, as we have said, claims a cost price of $100 a share for all of its United stock, making a total of $87,700. We think that price was satisfactorily proved. The stock admittedly became worthless in plaintiff's tax year 1929. Plaintiff was, therefore, entitled to that deduction.

The balance of plaintiff's deduction in its 1929 return of $160,126.02 for "stocks liquidated", viz., $72,426.02, was the difference between the cost to it of 6,701 shares of stock in the Emerson Piano Company, owned by it in 1922, which cost was $334,735.04, and the amount received by it as its share in stock and cash from the sale of the stock of that company, and most of its assets, to Shale and Williams, in 1922, and in cash from the liquidation of the remaining assets from 1922 to 1928.

Defendant contends that plaintiff was not entitled to this deduction of $72,426.02, its loss on the Emerson stock, because plaintiff in its consolidated income tax return for its fiscal year ended January 31, 1923, had been allowed an operating loss on account of the Emerson Company, an affiliate, of $216,844.96. Defendant claims that, under the doctrine of *Ilfeld Co.* v. *Hernandez*, 292 U. S. 68, plaintiff, having had the benefit of a loss on account of an affiliated company in a prior year, must subtract the amount of that loss from any loss suffered in a later year on account of the liquidation of its interest in that affiliate, and can claim a deduction only for the excess, if any.

Plaintiff concedes that the rule of *Ilfeld Co.* v. *Hernandez*, *supra*, would prevent it from having the benefit of the loss

claimed in 1929 "if the loss claimed in the return for 1929 was a loss on the liquidation of the Emerson Piano Company." Plaintiff revises its figures from those given in its 1929 return, and now asserts that its loss in 1929 was $70,264.31 instead of $72,426.02, and that instead of its loss being the difference between the cost to it of the Emerson stock and the amount received in the liquidation of the Emerson assets, as was the theory of its 1929 return, its loss was the difference between the value of its proportionate share of the Emerson assets at the time they were turned over to it in 1922 as trustee for liquidation, and its share of the proceeds of that liquidation. Its claim seems to be that the liquidation of the Emerson company occurred in 1922, and that what it received then ceased to have any relation to Emerson, and became its own assets; that it was, therefore, entitled to deduct as a loss the difference between the fair value of those assets in 1922 and what it received for them when they were sold during the period from 1922 to 1929.

But the liquidation of the Emerson Company was not complete in 1922. What occurred in that year was that that Company assigned all of its remaining assets to plaintiff as trustee to pay the debts of Emerson from the proceeds of the disposition of those assets, and distribute the residue pro rata among the stockholders. The liquidation was not in fact completed until 1928. We think, therefore, that the theory on which plaintiff asserted its loss in its 1929 return was correct, and that its present theory is not tenable. However, the rule of *Ilfeld Co.* v. *Hernandez*, *supra*, does not permit the deduction and the defendant is entitled to a set-off of $72,426.02.

Plaintiff concedes that the defendant is entitled to its claimed set-off of $16,851.46 on account of a deduction made by plaintiff for a discount given by the city of Philadelphia for taxes prepaid. The defendant concedes that plaintiff is entitled to a deduction of $13,639.79 for amortization of leaseholds for the year in question. The result is that plaintiff is entitled to deductions on its 1929 income-tax return of $133,-729.86 and $13,639.79. Against these sums defendant is entitled to set-offs of $72,426.02 and $16,851.46. Plaintiff is, therefore, entitled to recover.

Entry of judgment will be deferred until the presentation of a stipulation by the parties, or if no such stipulation is presented, until the filing of a report by a commissioner of this court showing the amount due plaintiff in accordance with this opinion. It is so ordered.

Jones, *Judge;* Whitaker, *Judge;* Littleton, *Judge;* and Whaley, *Chief Justice*, concur.

LeROY COLLINS, RECEIVER OF THE NATIONAL CONSTRUCTION COMPANY TO THE USE OF WALDROP HEATING & PLUMBING COMPANY v. THE UNITED STATES

[No. 43312. Decided April 7, 1941]

On the Proofs

Government contract; heat furnished by defendant.—Where plaintiff, under the provisions of a contract with the Government for the remodeling of a post-office building and the demolition and construction of other buildings, was obligated to furnish temporary heat to portions of the existing building occupied during construction; and where permission to begin work on the heating plant of the old building was withheld by the defendant during the heating season, and meanwhile heat was furnished by the defendant in the usual way; and where in final settlement the cost of furnishing such heat during said period was withheld by the defendant, it is *held* that the plaintiff is entitled to recover.

Same; counterclaim; excess expense.—Where because of unsatisfactory progress the contractor's right to proceed under a contract for construction of Government buildings was terminated by the Government; and where the surety on the defaulting contractor's bond did not elect to complete the work under the contract and a contract for completion was awarded to another contractor; it is *held* that the evidence does not establish that such changes as were made in the completion contract increased the cost of the work or the time required in any substantial degree, and defendant is accordingly entitled to recover on its counterclaim for the excess expense caused by the failure of plaintiff to comply with the terms of the contract.

Same; subcontractor.—Where subcontractor completed its work in accordance with its contract with plaintiff and was not responsible for the failure of plaintiff to comply with plaintiff's contract with defendant, and where defendant had no contract with the subcontractor, it is *held* that the subcontractor cannot recover from the defendant.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Mr. H. A. Julicher, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. October 8, 1935, plaintiff, LeRoy Collins, was appointed Receiver of the National Construction Company, a Florida corporation (hereinafter sometimes referred to as the "contractor"), which appointment was confirmed and continued by court order of November 21, 1935.

2. July 14, 1930, the National Construction Company entered into a contract with the United States to furnish all labor and materials and to perform all work required for "the demolition of certain buildings and extension and remodeling (except elevators and elevator hatchway entrances), and approaches, at the Post Office, Court House, and Custom House, Richmond, Virginia." In general the contract called for extensive renovation and remodeling of the Post Office building, the demolition of adjoining structures, and the construction of an extension to the Post Office building.

3. September 10, 1930, the National Construction Company entered into a contract with the Waldrop Heating & Plumbing Company (hereinafter sometimes referred to as the "subcontractor"), a South Carolina corporation, to furnish all materials, labor, and tools, and to perform all work required for the installation of the mechanical equipment, plumbing, heating, and gas piping required under the contract referred to in finding 2 of the National Construction Company with the United States. The materials to be furnished and work to be done by the subcontractor under its contract with the contractor were to be in accordance with

the contract and specifications entered into by the contractor with the United States. The contract of the subcontractor also contained a provision that the subcontractor should provide and maintain temporary heating apparatus necessary to furnish sufficient heat during cold weather.

4. The contract and specifications entered into between the contractor and the United States provided, among other things, the following:

> 17. *Manner of conducting the work.*—The building will be occupied during the life of the contract hereunder. The work shall be so done as to cause the least possible interruption to the Government business. The contractor shall provide satisfactory temporary facilities to permit all business to be continued during the operations under the contract.
>
> * * * * *
>
> 38. *Temporary heat.*—The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.
>
> * * * * *
>
> 1019. *Temporary heat.*—The contractor is to furnish temporary heat to portions of building occupied during construction.

5. One of the items called for under the contract between the contractor and the United States was the taking out of the old heating plant in the building which was being remodeled and replacing it with a new and larger plant, and that item was covered by the contract between the contractor and the subcontractor. This work was to be carried out while the building was occupied and heat was to be furnished by the contractor and/or the subcontractor when required for the portions of the building occupied during construction. The subcontractor planned to carry out this work by removing only a part of the heating equipment and replacing the equipment removed with new equipment before proceeding with the further removal of the old equipment, thus leaving enough of the heating system in place and in operation to enable it to supply heat for the occupied portion of the building.

When the subcontractor entered into its contract with the contractor the former understood that it was to commence

work within thirty days thereafter and it was ready within such time to proceed with the work, including work in the old building. In October 1930 the subcontractor began work in the new building being constructed, but, for reasons hereinafter shown, it was not permitted to begin work on the heating plant in the old building until about May 15, 1931.

6. In November and December 1930 representatives of the subcontractor applied to representatives of the defendant for permission to begin work on the heating plant in the old building, but access to the old building for the carrying on of such work was denied. The request was renewed in January 1931 and again denied. Such requests were oral and no definite plan or program was presented by the contractor or subcontractor to the defendant's representatives for approval as to how the work was to be carried out and how temporary heat was to be furnished for the occupants of the building during construction. Permission was again refused about April 1, 1931, and was not finally granted until about May 15, 1931, when the subcontractor was permitted to have access to the old building for the purpose of beginning its work on the heating plant. No written protest was made or appeal taken by the contractor or subcontractor from the refusals to have access to the old building.

7. Prior to the time when the subcontractor was given access to the old building, that company had been carrying on some of the work on the new building under its contract with the contractor. Thereafter the work on both the old and the new building required under its contract with the contractor was carried on by the subcontractor concurrently and by November 24, 1931, the subcontractor had substantially completed the work required by its contract with the contractor. The contractor completed its work under the principal contract about August 1, 1932, when the work was accepted by the United States.

8. In addition to the delay occasioned by failure to gain access to the old building until about May 15, 1931, the subcontractor was subjected to further delays by the Government through changes made in the plans and specifications. Without these delays, including the failure to gain access to the old building, the subcontractor would have

completed its contract by October 1, 1931, and the contractor would have completed its contract, insofar as necessary to be relieved of the necessity to furnish temporary heat, by November 24, 1931.

9. During the heating season of 1930–1931 the United States supplied the heat required for the old building, using its own fuel and own employees for that purpose, and made no request of either the contractor or the subcontractor to supply such heat, and likewise furnished such heat as was required for the period October 1 to October 24, 1931. From October 24 to November 24, 1931, the subcontractor furnished heat for the old building, and thereafter, until the completion of the contract of the contractor with the United States, the contractor furnished the required heat.

10. The total cost of furnishing the heat supplied by the Government during the 1930–1931 heating season and for the period from October 1 to October 24, 1931, was $4,883.61. The cost of furnishing heat by the subcontractor from October 24 to November 24, 1931, was $462.29, and by the contractor from November 24, 1931, to May 1932, the end of the 1931–1932 heating season, was $3,936.98.

11. Prior to about October 1931 no question had been raised as to who was required under the contract to furnish temporary heat to portions of the old building occupied during construction and no request had been made by the Government of the contractor or subcontractor to furnish such heat. However, about October 1931 the question arose as to who was required under the contract with the United States to furnish heat for the old building, and at the request of the subcontractor the contractor made a written request for a ruling and an interpretation of paragraph 1019 (referred to in finding 4), the second paragraph of such request reading as follows:

> Our subcontractor in interpreting this paragraph states that he takes it to mean that he is to keep the plant ready for firing at any time during cold weather during the completion of the building and that it does not include the furnishing of fuel or firemen necessary to maintain temporary heat to the twenty offices now occupied in the old building. In further explanation he states that on other work which has been executed

the specifications are succinct in the explanation as to the subcontractor furnishing fuel and labor to produce temporary heat.

In response to that request for an interpretation the Acting Supervising Architect advised the contractor on November 18, 1931, as follows:

> Reference is made to your contract for extension of the Post Office building at Richmond, Virginia, and to your letter of the 7th instant in regard to paragraph 1019 of the specifications calling for temporary heat.
>
> The interpretation in the second paragraph of your communication that the boiler plant is to be kept ready for firing at any time during cold weather is correct.
>
> As this was to be a partially occupied building it was contemplated that the Government's regular fireman and Government fuel for the existing building would be used, and such action as may be necessary in this matter will be taken by this office.

The above interpretation was reversed by the Acting Supervising Architect in a letter to the contractor on December 5, 1931, as follows:

> Reference is made to a recent conference in this office in which both you and your subcontractor, the Waldrop Heating & Plumbing Company, were represented, relative to heating, and to your letter of November 7 requesting an interpretation as to whether or not you are required, by the terms of your contract, to provide heat for both the occupied and unoccupied portions of the building while it is under construction and until it is finally accepted by the Government. In this connection you are advised that the interpretation given you in office letter of November 18 reading, in part, as follows:
>
> "* * * The interpretation in the second paragraph of your communication that the boiler plant is to be kept ready for firing at any time during cold weather is correct.
>
> "As this was to be a partially occupied building, it was contemplated that the Government's regular fireman and Government fuel for the existing building would be used, and such action as may be necessary in this matter will be taken by this office,"
>
> was in error and is hereby rescinded.

> It is the interpretation of this office that paragraph 1019 of the specifications, reading as follows: "The contractor is to furnish temporary heat to portions of the building occupied during construction," requires you to furnish the necessary heat in the occupied portions of the building in addition to the temporary heat to protect the work, required by paragraph 38 of the specifications, and you will be required to furnish same without cost to the Government, and in accordance with the terms of your contract.

12. In the final settlement by the defendant of its contract with the contractor, defendant determined the "completion date" under the contract as November 24, 1931, that is, the date when the contractor would have been able to complete the work under the contract and be relieved of the responsibility for furnishing temporary heat. On the basis of that determination, the defendant withheld from the amount otherwise due the contractor, the sum of $4,883.61, representing the cost to the defendant of furnishing heat to the old building during the 1930–1931 heating season ($4,455) and the cost to the defendant for a like purpose for the period October 1 to October 24, 1931 ($428.61). The defendant, however, credited the contractor with the cost to the contractor of furnishing temporary heat after the completion date, November 24, 1931, to the end of the 1931–1932 heating season, such credit amounting to $3,936.98.

After the amount of $4,883.61 had been withheld by the defendant from the amount due the contractor, the contractor withheld a like sum from the amount due the subcontractor. The amount withheld has not been paid by the United States either to the contractor or the subcontractor and is the amount sought to be recovered in this suit.

13. June 23, 1934, the subcontractor through and in the name of the contractor filed a claim with the Government for payment of the amount withheld as shown in the preceding finding. That claim was denied February 19, 1935, in a letter to the contractor, one paragraph of which read as follows:

> Heat was furnished by the Government during the period October 1, 1930, to May 15, 1931, at a cost of $4,455 and from October 1 to October 24, 1931, at a

cost of $428.61, a total of $4,883.61. Heat was furnished by you during the period October 24, 1931, to May 1, 1932, at a cost of $4,399.27. By letter of October 29, 1932, of the Assistant Secretary of the Treasury, it was held that you were required to furnish heat to November 24, 1931, the original date set for the completion of the contract, but that you were entitled to credit for the amount expended for heat during the time required for the additions to the contract. The cost for the period October 24 to November 24, 1931, was estimated at $462.29, leaving a balance of $3,936.98 for the period after that date. The difference between $4,883.61, the cost of heat furnished by the Government during the period ending October 24, 1931, and $3,936.98, the amount expended by you for the period November 24, 1931, to May 1, 1932, was $946.63, which was the amount deducted from the final payment under the contract.

Counterclaim

14. April 23, 1932, pursuant to competitive bidding a contract was awarded by the United States to the National Construction Company (the contractor heretofore referred to) for the construction of a Post Office and Court House at Terre Haute, Indiana, in accordance with specifications, schedules, and drawings. The original contract price was $439,000, but due to certain additions and deductions the net total was $442,581.57. The completion date under the contract was August 1, 1933, but due to extensions and excusable delays the completion date was advanced to September 4, 1933.

15. July 2, 1934, because of unsatisfactory progress, the contractor's right to proceed under the contract referred to in the preceding finding was terminated pursuant to the terms of Article IX of the contract but the surety, the Consolidated Indemnity and Insurance Company, on the bonds of the defaulting contractor did not elect to complete the work under the contract. At that time the work was ninety-four percent complete and vouchers in the sum of $388,304.63 had been paid the contractor.

16. October 22, 1934, pursuant to competitive bidding, a contract was awarded to the Fred R. Comb Company of Minneapolis, Minnesota, to complete the work under the contract referred to in finding 14. The completion price named

in the contract was $50,853, but of that amount $1,000 represented the consideration for items not included under the original contract with the contractor, the consideration for completion of the work remaining to be done under the National Construction Company's contract being $49,853.

17. The contract between the United States and Fred R. Comb Company contained all of the articles included in the original contract between the United States and the National Construction Company for the same work, and in addition certain provisions relating to the use of articles, materials, and supplies mined, produced, or manufactured in the United States, to compliance with the National Industrial Recovery Act, and to reports to be made to the Department of Labor on labor employed and materials used. These additional provisions appear in paragraph 6 of a stipulation filed in this proceeding and are incorporated herein by reference.

18. The specifications for the work under the contract between the United States and the Fred R. Comb Company were similar to the specifications for the work under the contract between the United States and the National Construction Company, except for the following additional paragraphs:

> *Alternate price.*—For furnishing all labor and material and performing all work required under "alternate work" of this specification *one thousand and no/100 dollars* ($1,000) in addition to the above lump sum amount.
>
> Paragraph X15. The items listed below (Paragraphs X16 to X20, inclusive) shall be done if the alternate price is accepted.

Paragraphs X16 to X20, inclusive, provided for additional work as follows:

> (1) Certain lead-coated copper sheet metal work as shown on drawing SA–MY–204A.
>
> (2) Placing of concrete slab in scale-pit as shown on drawing SA–MY–204A.
>
> (3) Placing of aluminum screens on back of radiator recess grills.
>
> (4) Change in specifications for glass in observation units.
>
> (5) Change in painting plaster around "lookouts."

Paragraph X21 consisting of 2½ pages related to the treatment of the floors.

19. The Government made claim for excess costs resulting from the default of the National Construction Company under its contract as follows:

(1) Certain defects in the work which had been performed by the National Construction Company were authorized for correction April 18, 1935, in the amount of	$647.20
(2) The defaulting contractor was responsible for water costs incurred in connection with the contract work, and is, therefore, chargeable with the amount of	30.00
[These charges were paid by the Government for water protection from June 22, 1934, to October 25, 1934, when the Comb Company took over the work.]	
(3) Rent paid by the Government for temporary post office quarters from September 4, 1933 (last date for completion under the National Construction Company contract), to February 18, 1935	14,007.62
(4) Constructing engineer's salary from September 5, 1933, to February 18, 1935	4,494.30

The work of the National Construction Company was behind schedule at the time the contract was terminated but no liquidated damages were assessed.

20. The original cost under the National Construction Company contract compared with the actual cost to complete the work resulted in the payment of excess costs by the Government, for which a counterclaim is asserted, as follows:

Cost under the original National Construction Company contract		$442,581.57
Actual Cost:		
(1) Paid to National Construction Company	$388,304.63	
(2) Paid Fred R. Comb Company	49,853.00	
(3) Paid for correction of defects	647.20	
(4) Paid for water rent	30.00	
(5) Paid engineer's salary	4,494.30	
(6) Paid rental—post office quarters	14,007.62	
		457,336.75
Total excess cost paid by United States		14,755.18

21. Claims have been filed by the defendant with the Receiver of the National Construction Company and the Receiver of the Consolidated Indemnity and Insurance Company, and the reinsurer, the Excess Insurance Company of America, has been notified but no part of the $14,755.18 here claimed has been paid.

The court decided that the plaintiff was entitled to recover on the contract upon which the suit was brought, and that defendant was entitled to recover on its counterclaim.

Green, *Judge*, delivered the opinion of the court:

The plaintiff, LeRoy Collins, is Receiver of the National Construction Company, a Florida corporation, which on July 14, 1930, entered into a contract with the United States to furnish all labor and materials and perform all work required for the demolition of certain buildings and remodeling of and construction of certain other buildings at Richmond, Virginia. On September 10, 1930, the National Construction Company entered into a contract with the Waldrop Heating & Plumbing Company to do certain of the work and install the mechanical equipment required by the contract with the defendant, as shown by Finding 3.

The contract and specifications entered into between the National Construction Company and the United States provided among other things as follows:

> 17. *Manner of conducting the work.*—The building will be occupied during the life of the contract hereunder. The work shall be so done as to cause the least possible interruption to the Government business. The contractor shall provide satisfactory temporary facilities to permit all business to be continued during the operations under the contract.
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> * * * * *
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> 38. *Temporary heat.*—The contractor shall provide temporary heat as necessary to protect all work and materials against injury from dampness and cold, to the satisfaction of the Construction Engineer.
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> 1019. *Temporary heat.*—The contractor is to furnish temporary heat to portions of building occupied during construction.

One of the items called for under the contract with the Government was the removal of the old heating plant in the building which was being remodeled and replacing it with a new and larger plant. That item was covered by the contract between the contractor and its subcontractor, the Waldrop Heating & Plumbing Company. This work was to be carried on while the building was occupied and heat was to be furnished by the contractor pursuant to paragraph 1019 set out above. The subcontractor planned to carry out this work by removing only a part of the heating equipment and replacing the equipment removed with new equipment before proceeding with the further removal of the old equipment, thus leaving enough of the heating system in place and in operation to enable it to supply heat for the occupied portion of the building.

When the subcontractor entered into its contract with the contractor the former understood that it was to commence work within thirty days thereafter and it was ready within such time to proceed with the work, including work in the old building. In October 1930 the subcontractor began work in the new building being constructed, and in November and December 1930 applied for permission to begin work on the heating plant in the old building, but permission was denied. Request was renewed in January 1931 and again denied. Permission was not finally granted until about May 15, 1931, when the subcontractor was permitted to have access to the old building for the purpose of beginning work on the heating plant. Thereafter work on both the old and new buildings required by the contract was carried on concurrently. The subcontractor completed its work on November 24, 1931, and the contractor completed the work under the principal contract about August 1, 1932, when the work was accepted by the United States. If the work had not been delayed by failure to gain access to the old building until about May 15, 1931, and the subcontractor had not been subjected to further delay through changes made in the plans and specifications, the subcontractor would have completed its contract by October 1, 1931, and the contractor would have completed its part, insofar as necessary to be relieved of any necessity to furnish temporary heat, by November 24, 1931.

During the heating season of 1930 and 1931 the United States supplied the heat required for the old building and made no request upon either the contractor or subcontractor to furnish such heat; and likewise furnished such heat as was required for the period from October 1 to October 24, 1931. From the date last named to November 24, 1931, the subcontractor furnished heat for the old building, and thereafter, until the completion of the contract of the contractor with the United States, the contractor furnished the required heat.

The total cost of furnishing the heat supplied by the Government during the 1930–1931 heating season and for the period from October 1 to October 24, 1931, was $4,883.61. The cost of furnishing heat by the subcontractor from October 24 to November 24, 1931, was $462.29, and by the contractor from November 24, 1931, to May 1932, the end of the 1931–1932 heating season, was $3,936.98.

About October 1931 the question arose as to who was required under the contract to furnish heat for the old building. In response to a request for an interpretation of the contract the supervising architect replied, with reference to the extension of the Post Office building and in regard to paragraph 1019 of the specifications calling for temporary heat: "As this was to be a partially occupied building it was contemplated that the Government's regular fireman and Government fuel for the existing building would be used." This ruling was later reversed by the supervising architect by a letter to the contractor on December 5, 1931, in which it was held that the contractor was required "to furnish the necessary heat in the occupied portions of the building in addition to the temporary heat to protect the work."

In the final settlement by the defendant of its contract with the contractor, defendant determined the "completion date" under the contract was November 24, 1931; that is, the date when the contractor would have been able to complete the work under the contract and be relieved of the responsibility for furnishing temporary heat. On the basis of that determination, the defendant withheld from the amount otherwise due the contractor the sum of $4,883.61, representing the cost to the defendant of furnishing heat to the

old building during the 1930–1931 heating season ($4,455) and the cost to the defendant for a like purpose for the period October 1 to October 24, 1931 ($428.61). The defendant, however, credited the contractor with the cost to the contractor of furnishing temporary heat after the completion date, November 24, 1931, to the end of the 1931–1932 heating season, such credit amounting to $3,936.98.

After the amount of $4,883.61 had been withheld by the defendant from the amount due the contractor, the contractor withheld a like sum from the amount due the subcontractor. The amount withheld has not been paid by the United States either to the contractor or the subcontractor and is the amount sought to be recovered in this suit. The plaintiff conceded in argument that the defendant furnished heat for the period and at the cost as stated above.

The plaintiff's case depends upon the construction of the specifications of the contract which relate to, or provide for, the contractor's obligation for supplying heat. The first of these, paragraph 17 of the specifications, set out above, is general in its terms and has given rise to no controversy between the parties.

Paragraph 38 relates only to the supplying of temporary heat for the protection of work and materials, and its meaning is not in dispute.

Paragraph 1019 of the specifications provides that the contractor is to furnish temporary heat to the portions of the building occupied during construction. The plaintiff contends that the contract contemplated the remodeling of an existing building which was to be occupied during the life of the contract and that this paragraph had application only to the original or existing building.

No work was being carried on in or about the existing building during the time the defendant was furnishing heat and the extension or new building was not occupied during its construction.

We think the construction placed upon the provisions of the contract by the plaintiff is correct and it will be observed that the parties acted accordingly; the defendant, without objection, furnishing the heat for which it now contends it should be paid. Also that the greater part of

the heat was furnished during a period when the defendant refused to permit the work to be carried on in the existing building, and it is obvious that until construction began temporary heat was not required. The heat which defendant supplied was the regular heat, using its own equipment and employees. It should also be noted that the supervising architect at first ruled in accordance with plaintiff's contention. Construction was going on in the existing building during the period from October 1 to October 24, 1931, and during that period, under the language of the specifications, it would appear that the contractor was obligated to supply temporary heat, the cost of which was $428.61. The Government withheld $4,883.61. Deducting the amount of $428.61, for which the plaintiff is liable, we find there is due on the contract $4,455.

Counterclaim

The defendant pleads a counterclaim against the plaintiff in the amount of $14,755.18, representing the excess costs incurred in completing the work under a contract made by the United States with the National Construction Company for the construction of a post office and courthouse at Terre Haute, Indiana, as shown in Finding 14.

Because of unsatisfactory progress the contractor's right to proceed under the contract referred to above was terminated. The surety on the bond of the defaulting contractor not having elected to complete the work under the contract, a contract was awarded for the completion of the work as shown in Findings 16, 17, and 18, the Government making claim for the excess costs resulting from the default of the National Construction Company as shown in Finding 19.

There is no dispute as to the facts on which the counterclaim is based or the amount of expense incurred by the Government. The sole defense to the counterclaim is a claim that the new contract departed substantially from the original terms of the contract and thereby increased the costs of completion, and it is said that it is held in the case of *Rosenberg* v. *United States*, 76 C. Cls. 662, that in

such a case the increased costs cannot be charged to the defaulting contractor. We think that what was said in the opinion cited, when taken as applied to the facts in the case and analyzed, means that where the increased costs arise from a departure from the original contract they cannot be charged to the defaulting contractor. In the case cited there was a very substantial departure from the original contract terms in that the new contract required new work at an increased cost. In the case before us the new contract provided alternatively for new work at an increased price but if this new work was performed the price was to be paid by the defendant and no charge is now made against the plaintiff on account of any new work. What the defendant seeks to recover is the excess expense caused by the contractor's default in completing the work required by the original contract. It asks for $647.20, the cost of correction of certain work; $30 for water costs during the period when the new contractor took over the work; $14,-007.62 rent paid for temporary post office quarters from the last date for completion of the first contract to the time when the contract work was finished; and, $4,494.30 for constructing engineer's salary for the same period. All these items arose directly from the failure of the plaintiff to comply with the original contract. These items when added to the amount paid the National Construction Company, $388,304.63, make the actual cost to the Government $457,336.75. The difference between this last-named amount and $442,581.57, the cost under the original contract, is $14,755.18, which is the total excess cost to the United States.

There were some additional provisions in the contract between the United States and the completion contractor which are set out in Finding 17. These provisions required the contractor to use domestic materials and to prepare detailed reports for the Labor Department. There is nothing in the evidence, however, to show that these provisions increased the cost of the completion contract, and the nature of them is such that we cannot presume that any substantial increase would result therefrom. We think the

increased cost, if any, would be merely nominal, and it is apparent that no more time would be required.

It is argued, however, that the specifications for the work under the completion contract contained a paragraph, designated as X21, which required work not provided for under the original contract and not covered by the separate bid made by the completion contractor. All that the court has before it to support this claim is the statement in the commissioner's Finding 18 that paragraph X21 "related to the treatment of the floors." Even if the original contract did not specify the treatment which the floors would receive, there would be an implied contract that they should be properly finished. The court will take judicial notice that there are various ways of treating floors and it is probable that some require more time and expense than others, but as we do not know what treatment was required by the new contract and whether or not it would require any more time or expense than that provided for by the original contract, we cannot say that either the time or expense was increased by reason of this provision. It will be observed that the new contract contained a direct reference to additional work which was enumerated. We think that if the provision of the contract relating to the treatment of floors required any additional work or contained anything more than an amplification of what was contained in the original contract it would have been included in the provisions for additional work. As the cost of the new work was to be paid by the defendant and the other changes in the contract are not shown to have increased either the cost of the work or the time required in any substantial degree, we can see no reason why the defendant should not recover the excess expense caused by the failure of plaintiff to comply with the terms of the contract.

It is argued on behalf of plaintiff that the subcontractor completed its work and that it was not responsible for the failure of the plaintiff to comply with its contract and therefore should be paid, but the defendant had no contract with the subcontractor and was not bound to it in any way. The misfortune of the subcontractor is due to its making a contract with an irresponsible party.

The defendant is entitled to recover the amount of the excess cost incurred in completing the contract, which as above stated is $14,755.18. Deducting from this sum the $4,455.00 which we find was due plaintiff under the contract upon which it began suit we have $10,300.18, for which amount judgment will be rendered in favor of the defendant.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

THE AYER COMPANY v. THE UNITED STATES

[No. 43540. Decided April 7, 1941]

On the Proofs

Tax on cosmetics; sales through wholly owned subsidiary of manufacturer.—Where plaintiff, a corporation engaged in the manufacture of cosmetics and toilet preparations of various kinds, in April 1933 organized a subsidiary corporation to handle the sale of its products to wholesalers and retailers; and where the activities of said subsidiary were carried on by the same persons who had carried on these activities for plaintiff; and where its board of directors and officers were the same as plaintiffs, and where the said subsidiary had no operating capital, and no office space except that furnished without charge by plaintiff, and where all of said subsidiary's capital stock was owned by plaintiff; it is *held* that sales made by said subsidiary must be treated as having been made by plaintiff for the purposes of taxation imposed by section 603 of the Revenue Act of 1932.

Same; manufacturer's price determined by the Commissioner.—Where it is provided under section 619 of the Revenue Act of 1932 that if an article is sold at retail the tax imposed thereon by said act shall be computed on the price for which such article is sold in the ordinary course of trade by the manufacturer or producer thereof; it is *held* that what this price is shall be determined by the Commissioner of Internal Revenue under the provisions of the act.

Same.—In the instant case, it is *held* that the plaintiff has not shown by the evidence adduced that the price determined by the Commissioner as the price to wholesalers was not the price denominated by the statute.

Same; manufacturer's advertising expenses not excluded.—Where under section 619 (a) of the Revenue Act of 1932, "transportation, delivery, insurance, installation, and other charges" established to the satisfaction of the Commissioner shall be excluded from the sales price; it is *held* that the items excluded are those expenses which are incurred in addition to the cost of manufacture, and that "advertising expenses" are not intended by Congress to be so excluded.

Same.—Where Congress in the enactment of the Revenue Act of 1939, added to the expense items excluded in section 619 of the Revenue Act of 1932 the further items of "wholesaler's salesmen's commissions, and costs and expenses of advertising and selling" (section 3); it is *held* that this addition was not intended by Congress as clarification of the language employed in the prior act but was an amendment thereto.

Same.—In the amending act of 1939 it was not all advertising and selling expenses that were to be excluded but only the wholesaler's expenses of advertising and selling; manufacturer's advertising and selling expenses are not mentioned.

The Reporter's statement of the case:

Mr. Charles B. Rugg for the plaintiff. *Messrs. H. Brian Holland*, and *Ropes, Gray, Best, Coolidge & Rugg* were on the brief.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a corporation organized under the laws of the Commonwealth of Massachusetts, with its principal place of business at Lowell, Massachusetts. For many years it has been engaged in manufacturing medicines, and from 1930 on has been engaged in the manufacture of cosmetics and toilet preparations of various kinds, under the trade-mark "Vita-Ray."

2. Prior to April 1933 plaintiff sold its Vita-Ray products to the retail trade. For this purpose it maintained a sales department separate from that which handled the sale of its medicines. On April 28, 1933, it organized the Vita-Ray Corporation to take charge of the sale of its Vita-Ray products. This was done pursuant to a plan conceived

shortly after the passage of the Revenue Act of 1932, which first imposed a tax on cosmetics and toilet articles. When this plan was conceived plaintiff wrote the Bureau of Internal Revenue stating that it proposed to organize such a corporation and sell to it its products, and to have it sell these products to the retail trade. It desired to know whether or not such a plan was permissible. The Bureau never responded further than to acknowledge receipt of the letter, but the corporation was nevertheless organized on April 28, 1933, with a nominal capital stock of $300, all of which plaintiff owned.

Upon the formation of this corporation plaintiff transferred to it its inventory, trade-marks, and accounts receivable, charging plaintiff therefor on its books. Thereafter, plaintiff sold its output of Vita-Ray products to the Vita-Ray Corporation on credit. This corporation had no capital and so made payments on this account only as the products were sold. The officers and board of directors of the plaintiff and of the Vita-Ray Corporation were identical. The employees of the Vita-Ray Corporation were the same as those formerly employed by the plaintiff in the Vita-Ray sales department. The Vita-Ray Corporation occupied space in plaintiff's building, but paid no rent therefor. All of its employees, other than its sales force, were paid by the plaintiff.

The Vita-Ray Corporation kept its own books and records and bank account, maintained fire insurance on its inventory, and paid personal property taxes thereon.

3. The plaintiff sold its products to the Vita-Ray Corporation at cost, plus 15 percent, plus the manufacturer's excise tax. The Vita-Ray Corporation sold these products to the retail trade at the retail price, less 40 percent, the same price at which the plaintiff had formerly sold it. From the proceeds of the sale of these products the Vita-Ray Corporation first paid its selling expense, and for the jars, covers, and labels for the products, and the freight charges thereon. Whatever balance was left it applied on its account with the plaintiff.

4. Vita-Ray Corporation maintained a complete advertising, selling, and distributing organization. The larger

cities were covered by salaried salesmen and the smaller communities were reached by an extensive circularizing campaign. Nation-wide advertising was conducted through the popular women's magazines. Vita-Ray products were sold principally to department stores and chain and independent drug stores. Special demonstrators paid by and working exclusively for Vita-Ray Corporation gave demonstrations of the Vita-Ray line in the larger department stores, these demonstrations usually being accompanied by local newspaper advertising, the cost of which was divided equally between Vita-Ray Corporation and the stores.

5. When the Revenue Act of 1932 became effective plaintiff increased the prices for its products by the amount of the tax, raising its prices to the retail trade from 60 cents to 66 cents. However, the cosmetic business is highly competitive, and as a result of this increase in price plaintiff's sales fell off to such an extent that it was necessary for it to reduce its price to the former amount of 60 cents, which it did in October 1932. Thereafter, the tax was no longer added to the price of the products. No part of the tax here in controversy was included in the price of the articles to the retail trade.

6. The following schedule shows the selling and advertising expenses actually incurred by Vita-Ray Corporation in the month of October 1934, and the monthly average of selling and advertising expenses incurred by that corporation in its fiscal year 1934–1935:

	October 1934	Average month of fiscal year 1934–35
Sundry:		
Freight in	$0.67	$9.42
Freight out	751.59	882.95
Miscellaneous selling	----------	19.21
Packing and shipping	2.00	75.73
Advertising:		
Freight on advertising	----------	.25
Newspace	116.05	928.64
Magazines	1,330.00	3,720.42
Makeup	----------	312.31
Mats	----------	55.55
Art work	16.16	107.29
Proofs	----------	31.47
Literature	330.29	566.23
Window display	----------	1.62
Miscellaneous advertising	150.00	129.41
Circular letters	----------	55.34

	October 1934	Average month of fiscal year 1934-35
Advertising—Continued.		
Display signs	1.50	187.90
Demonstrations	150.61	324.74
Radio	12.50	13.89
Prizes	----	5.12
Chicago office	86.77	102.32
Special promotions	----	320.03
Samples	202.02	200.89
New York office	86.64	57.00
Selling and administrative:		
Breakage	14.26	16.12
Allowance	----	6.09
Exchanged goods	(.70)	(.38)
Refunds	----	2.63
Commissions, demonstrators	567.47	883.66
Commissions, salesmen	1,488.51	1,915.37
Demonstrators' salaries	3,158.79	3,492.29
Demonstrators' travel expense	160.98	174.69
Century of Progress	53.00	40.95
Gratuities	106.08	149.44
	8,785.19	14,788.59

The item designated "newspace" represented the cost of newspaper advertising in connection with special demonstrations. The item "literature" refers to advertising circulars mailed out or given away by demonstrators. The item "demonstrations" refers to materials used in demonstrating Vita-Ray products. "Century of Progress" refers to the cost of maintaining a Vita-Ray exhibit at the World's Fair in Chicago.

7. On November 28, 1934, the plaintiff filed a manufacturer's excise tax return for the month of October 1934, showing a tax due of $272.36, which it paid to the collector of internal revenue on December 1, 1934. The tax shown on said return was based upon the prices for which plaintiff sold the articles to Vita-Ray Corporation, and the quantities sold to that corporation in October 1934.

On May 6, 1936, the collector filed a return on behalf of plaintiff showing an additional assessment for October 1934 of $1,140.61, which plaintiff paid, together with interest of $155.90, on July 1, 1936. The additional tax thus computed by the collector and paid by plaintiff was based upon the prices for which Vita-Ray Corporation sold to the trade in October 1934, that is, retail less 40 percent, and the quantities sold by Vita-Ray Corporation in that month.

On July 1, 1936, plaintiff filed a claim for refund of the additional tax and interest paid on that date, asserting that the Commissioner of Internal Revenue had improperly increased the price for which the articles subject to tax were sold by plaintiff. The claim for refund was disallowed by the Commissioner September 27, 1937, after the filing of the petition in this case, on the ground that the Vita-Ray Corporation was the selling agent of plaintiff and that the tax payable by plaintiff was properly based on the selling prices received by Vita-Ray Corporation. Subsequently the Commissioner recomputed the tax, basing it on the selling prices received by Vita-Ray Corporation less 7½ percent. The tax for the month of October 1934, as finally computed by the Commissioner, was $1,295.98, and the difference between that amount and the total tax of $1,412.97 actually paid by plaintiff was credited against taxes for other months.

8. The original excise tax return filed for the month of October 1934, on November 28, 1934, was based upon plaintiff's prices to Vita-Ray Corporation, which did not include the cost of containers, as provided by section 619 of the Revenue Act of 1932. If the cost of containers had been included as part of plaintiff's cost, the total tax due, on the basis of plaintiff's sales to Vita-Ray Corporation, would have been $370.40 instead of $272.36, as shown thereon.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The facts are fully set out in the findings of fact. The question presented is the proper basis for the tax on plaintiff's sales of cosmetics imposed by section 603 of the Revenue Act of 1932 (47 Stat. 169, 261). This section reads in part:

> There is hereby imposed upon the following articles, sold by the manufacturer, producer, or importer, a tax equivalent to 10 per centum of the price for which so sold; Perfumes, essences, extracts, toilet waters, cosmetics, * * *.

Section 619 sets out the formula for determining the sales price. It reads:

SEC. 619. SALE PRICE.

(a) In determining, for the purposes of this title, the price for which an article is sold, there shall be included any charge for coverings and containers of whatever nature, and any charge incident to placing the article in condition packed ready for shipment, but there shall be excluded the amount of tax imposed by this title, whether or not stated as a separate charge. A transportation, delivery, insurance, installation, or other charge (not required by the foregoing sentence to be included) shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations.

(b) If an article is—

(1) sold at retail;
(2) sold on consignment; or
(3) sold (otherwise than through an arm's-length transaction) at less than the fair market price;

the tax under this title shall (if based on the price for which the article is sold) be computed on the price for which such articles are sold, in the ordinary course of trade, by manufacturers or producers thereof, as determined by the Commissioner.

The plaintiff takes the position, first, that the price at which it sold its products to Vita-Ray Corporation is the proper basis for the tax since it is the manufacturer's or producer's sales price, upon which the tax was levied; or, if incorrect in this, it says that in determining the sales price, advertising and selling costs are to be eliminated, in any event.

The Commissioner originally took the position that the Vita-Ray Corporation was the mere selling agent of the plaintiff and, therefore, that plaintiff's sales price was the price at which it sold its products to the retail trade, to wit, retail price less 40 percent, and he assessed the tax on this basis. Later, after this suit was filed, the Commissioner reduced this sales price by 7½ percent thereof, and assessed the tax accordingly, crediting plaintiff's liability for subsequent months with the difference.

It is obvious that the Vita-Ray Corporation was a mere shell. Its activities were carried on by exactly the same people who had carried on these activities for plaintiff before its organization; its officers were the same as plaintiff's officers; its board of directors were the same; it had no operating capital; it had no office space, except that furnished by plaintiff without charge; all of its capital stock of the total sum of $300 was owned by plaintiff. Its existence must be disregarded. Sales made by it must be treated as having been made by the plaintiff. *Higgins* v. *Smith*, 308 U. S. 473; *Griffiths* v. *Commissioner*, 308 U. S. 355; *Gregory* v. *Helvering*, 293 U. S. 465; *Southern Pacific Co.* v. *Lowe*, 247 U. S. 330; *Gulf Oil Corp.* v. *Lewellyn*, 248 U. S. 71; *E. Albrecht & Son* v. *Landy*, 114 F. (2d) 202.

Treating the sales as having been made by plaintiff, the transaction is governed by section 619 (b) (1). This provides that if an article is sold at retail, the tax shall be computed on the price for which such article is sold in the ordinary course of trade by the manufacturer or producer thereof. What this price is, is to be determined by the Commissioner.[1]

The Commissioner was wrong in the beginning in fixing the retail price as the price upon which the tax should be computed. The price contemplated was that charged in the ordinary course of trade. In the ordinary course of trade this is the price charged by the manufacturer when he sold to a wholesaler. The defendant seems to admit this now (R. 82). But the Commissioner later reduced the retail price by 7½ percent thereof, and computed the tax on the remainder. Why he did this is not shown, but it is to be presumed that it was because this was his determination of the price at which manufacturers or producers sold such articles in the ordinary course of trade. This is the price the Commissioner was commanded to determine, and it is to be presumed he acted in accordance with law.

[1] Most of the courts have treated such transactions as governed by section 619 (b) (3), which provides that if the article is sold at less than market price, otherwise than through an arm's length transaction, then the tax shall be computed in the same way as if the article had been sold at retail. By whichever subsection governed, the result is the same.

The plaintiff has not shown that this was not the price to wholesalers and, of course, the burden was on it to do so. The price at which plaintiff sold its products to the Vita-Ray Corporation proves nothing; that was nothing more than a sale to itself. Rather, it was no sale at all. The fact that this price was 15 percent above plaintiff's manufacturing cost proves nothing, in the absence of proof that it was customary for manufacturers of cosmetics to sell to wholesalers on such basis. (We feel sure they did not sell on such basis, because such reckoning eliminates the most valuable element of the product, the consumer's demand for it, built up through advertising). For the same reason, the fact that the Vita-Ray Corporation bought some of its products from other people cheaper than plaintiff charged, proves nothing.

We have carefully studied plaintiff's brief and the record, and conclude that the plaintiff has not borne the burden of showing the price determined by the Commissioner was not that denominated by the statute.

But plaintiff says that if the sales to Vita-Ray Corporation are to be disregarded, nevertheless, advertising costs, at any rate, should be excluded from the sales price. We cannot agree that this is so. The price the plaintiff secured for the article was much greater on account of the advertising done. By advertising, the plaintiff put value in the article no less than when it added the vitamins to the cream; and that value it sold. As was said by the Second Circuit Court of Appeals in *Bourjois, Inc.* v. *McGowan*, 85 F. (2d) 510:

> But to take the appellant's products as mere unnamed blends, mixtures, or compositions salable to the trade as such at the time the appellant sold them is to ignore the very thing which gave them their peculiar sales value; that is, the trade names under which they were sold not only eventually to the wholesalers, retailers, and consumers but by the appellant itself to the sales corporations.

The tax is measured by the price for which the manufacturer sold its product. How this price was built up is immaterial.

But, it is argued that section 619 (a) requires the elimination of these expenses. This section eliminates from the sales price "transportation, delivery, insurance, installation, or other charge." It is argued that advertising expenses come within the phrase "other charge." We are unable to agree. The items excluded are those expenses which are incurred in addition to the cost of manufacture. Their exclusion indicates no more than that Congress had in mind the sales price f. o. b. factory, and meant to exclude those items of cost which go to make up the delivered or installed sales price.

Certainly advertising expenses are not of the same kind of things which are specifically mentioned—transportation, delivery, installation, and insurance charges.

Furthermore, Congress, in passing the act of 1939, evidently believed that the act of 1932 did not provide for the exclusion of advertising costs. Section 3 of the act of 1939 (53 Stat. 862, 863) reads in part:

> Whether sold at arm's length or not, a transportation, delivery, insurance, or other charge, *and the wholesaler's salesmen's commissions, and costs and expenses of advertising and selling* (not required by the foregoing sentence to be included), shall be excluded from the price only if the amount thereof is established to the satisfaction of the Commissioner, in accordance with the regulations. [Italics ours.]

It will be noted that this sentence is identical with the second sentence of section 619 (a) of the Revenue Act of 1932, except that there has been added the portion underlined, having to do with expenses of advertising and selling. The plaintiff says that this was added to the act merely for clarification, but we think not, for this reason, among others: Subsection (b) of section 3 of the Revenue Act of 1939 says:

> *The amendments* made by subsection (a) shall be effective only with respect to sales made after the date of the enactment of this Act. [Italics ours.]

It appears, therefore, in passing the act of 1939, the Congress thought that the exclusion of advertising and selling costs was an amendment of the prior act, and not merely a clarification thereof.

Syllabus

Note, moreover, that it was not all advertising and selling expenses that were to be excluded under the Revenue Act of 1939; it was only the wholesaler's expenses of advertising and selling. Manufacturer's advertising and selling expenses are not mentioned. By implication they are to be included. This, we think, is a continuation of the policy behind the 1932 act.

The Circuit Court of Appeals for the Seventh Circuit, in *Campana Corporation* v. *Harrison*, 114 F. (2d) 400, has reached a contrary conclusion. It was of opinion that selling and advertising costs should be excluded; in fact, that all nonmanufacturing charges were to be excluded. As we have said, advertising has added value to the article, and has enabled the manufacturer to secure therefor a better price, just as have the vitamins and its other tangible component parts. For this reason we see no basis for concluding that Congress meant to exclude these costs.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

HERMAN, FRED, CHESTER, ROBERT, AND WILLIAM GREILING, COPARTNERS, TRADING AS GREILING BROTHERS v. THE UNITED STATES

[No. 43562. Decided April 7, 1941]

On the Proofs

Government contract; delay and damages claimed.—Where plaintiffs' claim is based entirely upon the allegation that the defendant breached the contract by failing to furnish structural steel when requested, thereby causing delay and damages to plaintiffs in completion of the contract, and that for these reasons no amount was deductible under the liquidated damage clauses of the contract and that defendant should compensate plaintiffs for damages resulting from alleged unnecessary expenses; it is *held* that upon the facts disclosed by the record and upon a proper interpretation of the contract the plaintiffs are not entitled to recover.

Same; decision of contracting officer and department head.—Where after final completion of the contract the contracting officer and department head granted plaintiffs a hearing upon their claim for remission of liquidated damages and reimbursement for alleged unnecessary expense, and decided that plaintiffs were not entitled to payment; it is *held* that such decisions were not arbitrary or so erroneous as to imply bad faith but in the opinion of the court said decisions were correct.

Same.—It is *held:*

1. That plaintiffs are not entitled to recover any amount under items 1, 3, 4, 5, and 7 of their claim as set forth in finding 25.

2. That as to the amount of $221.99 for certain crushed stone, included in item 6 of plaintiffs' claim, as set forth in finding 17, plaintiffs are not entitled to recover, as the responsibility for protecting the crib for the winter months was that of the contractor.

3. That as to the amount claimed in item 2, $5,491.35, and the remainder of the amount claimed in item 6 (finding 25) $1,089.52, plaintiffs are entitled to recover in accordance with the findings and decisions of the Secretary of Commerce on appeal.

The Reporter's statement of the case:

Mr. Norman B. Frost for the plaintiffs. *Mr. George M. Weichelt*, *Dent*, *Weichelt & Hampton*, and *Frost*, *Myers & Towers* were on the brief.

Mr. J. Robert Anderson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Harry Fischer* was on the brief.

Plaintiffs seek to recover $49,329.44. The amount of $41,-056.58 thereof is made up of the amount of liquidated damages for delay deducted by the defendant and certain other items of alleged unnecessary costs and expenses, all of which, plaintiffs allege, resulted from and were caused by the failure of the defendant to furnish and deliver certain structural steel specified in the contract when plaintiffs requested the delivery thereof September 6, 1934; the balance of $8,272.86 represents costs and amounts alleged to be due under the contract but not paid.

The defendant contends that it did not delay plaintiffs or cause them to suffer any increased expense or damage over

that for which they were responsible under the contract, in being unable to deliver the structural steel to plaintiffs on September 6, 1934, for the reason that the contract and specifications contemplated and provided that plaintiffs would perform certain designated work under the contract before the erection of the structural steel; that this work was not performed by plaintiffs until after the structural steel was on hand or available for delivery; that plaintiffs' difficulties and delay in performing the work as contemplated and provided by the contract were due to failure of plaintiffs to have suitable and adequate equipment to commence and carry on performance of the work in the early stages of the contract period and thereafter; and that in any event the inability to deliver the steel in September 1934 was the result of an unavoidable cause beyond the control and without the fault or negligence of the defendant.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. The firm of Greiling Brothers was at all times hereinafter mentioned a partnership composed of Herman Greiling, the principal member of the firm, Fred, Chester, Robert, and William Greiling. The firm conducted a general contracting business, with offices at Green Bay, Wisconsin. Plaintiffs were experienced marine contractors, but they had had no previous experience in lighthouse construction or in the erection of structures in exposed locations on the Great Lakes.

2. July 19, 1934, the defendant issued an invitation for bids for the construction of Grays Reef Lighthouse in the northeasterly part of Lake Michigan, about 30 miles northwesterly from Harbor Springs and Petoskey. This invitation for bids sent to prospective bidders was accompanied by the form of contract to be entered into by the successful bidder and detailed specifications covering the project, to become a part of the proposed contract. An amendment to the specifications relating to Grays Reef Lighthouse was issued and delivered to prospective bidders, including plaintiffs, on July 27, 1934, before they submitted their bid.

3. August 2, 1934, the firm of Greiling Brothers, by Herman Greiling, submitted a bid for the construction of Grays Reef Lighthouse for a total lump-sum consideration of $108,587.50, as called for by Schedule A, being a part of the bid and in strict accordance with the form of contract PWA 51 and the detailed specifications, to become part thereof, which plaintiffs in their bid agreed to execute. The specifications, upon the basis of which bids were to be submitted, stated that it was desired that the work called for be completed in not less than 120 calendar days after the date fixed for commencement of work, and bidders were required to specify in their bids the number of days within which they would agree to complete the work called for. Plaintiffs in their bid specified that they would complete all of the work to be performed within "75 calendar days after order to proceed."

4. Bids were opened August 2, 1934, and Greiling Brothers and Luedtke Contracting Company were the only bidders. Plaintiffs' bid was $3,000 higher than the other bidder but the latter had fixed 120 days within which to complete the work, and, on the basis of evaluation of bids as specified in Paragraph I of Schedule A, plaintiffs were held to be the lowest bidder because of the period of time within which they proposed to complete the work, and their bid was accepted and the contract was awarded to them by the contracting officer August 8, 1934. Neither the award of the contract nor the execution thereof was required to be approved by any one other than the contracting officer.

Captain C. H. Hubbard, superintendent of lighthouses of the 12th Lighthouse District, was the contracting officer and remained such until sometime in 1935, when he was succeeded by G. B. Skinner, who was contracting officer until the work was completed in 1936.

August 8 the contracting officer notified Assistant Superintendent Norris M. Works (hereinafter sometimes referred to as "Supervising Engineer") of the 12th Lighthouse District, who was the representative of the contracting officer immediately in charge of the work, that plaintiffs' bid had been accepted and they had been awarded the contract, and directed Works to notify plaintiffs of this

and give them notice to proceed at once with the work. The contracting officer also directed his representative to notify plaintiffs that the contract time for completion would commence on August 13, 1934, which would be the date of the contract, which contract, embodying the specifications, plaintiffs had agreed to execute. Plaintiffs were so notified and advised by telephone by Norris M. Works on August 8, and this was confirmed by letter of August 11, 1934, mailed on that date to plaintiffs, as follows:

> Referring to your proposal No. 25611, covering the General Construction Contract for GRAYS REEF LIGHT STATION.
>
> Your proposal is hereby accepted for ITEM No. One–A–, in the amount of ONE HUNDRED EIGHT THOUSAND FIVE HUNDRED EIGHTY-SEVEN DOLLARS and FIFTY CENTS, Single Shift Operation ($108,587.50).
>
> This Order is effective Monday, August 13, 1934, for construction in SEVENTY-FIVE DAYS.
>
> The Rip Rap stone will not be ordered under your proposal, nor under your amended proposal, letter of Aug. 4, 1934. New bids will be issued for the required amount of rip rap, at once.
>
> The Main Concrete Slab to be full six feet in thickness.

After the above-quoted letter had been mailed and received by plaintiffs there was subsequently, on August 18, 1934, added at the bottom thereof, and signed by Works for Superintendent Hubbard, the following:

> P. S.—The above confirms our Telephone Advice to you on evening of Aug. 8, 1934.
>
> This acceptance is made subject to your letter of Aug. 15th, 1934, confirming your telephone advice to Mr. Works of this Office, that in view of the fact that your bid price was the same for Double Shift Operation as for Single Shift Operation, that you will "ARRANGE TO CARRY ON THE CONSTRUCTION WORK AT GRAYS REEF LIGHT STATION ON THE DOUBLE SHIFT FORCE BASIS."

5. The written contract embodying all of the specifications, including the amendment of July 27, 1934, the invitation for bids, the bid and Schedule A thereof, was dated August 13, 1934, and was signed for and on behalf of the United

States by C. H. Hubbard, the contracting officer, and for plaintiffs by Herman Greiling; and immediately above the signatures of the parties appeared the following: "In witness whereof the parties hereto have executed this contract as of the day and year first above written."

Article 1 of the contract provided that "The contractor shall furnish all labor and materials, and perform all work required for constructing Grays Reef Light Station, in accordance with Item 1A of Schedule Form A, * * * in strict accordance with the specifications, schedules, and drawings, all of which are made a part hereof and designated as follows: * * * The work shall be commenced upon notification to proceed, and shall be completed within 75 days from the date of this contract." The contract fixed October 27, 1934, as the date for completion of the entire work called for thereby.

L. H. Comfort was and had been for about forty years foreman of the Lighthouse Service, and he was the foreman and inspector for the defendant on the work called for by plaintiffs' contract. During this period of service he had been the representative of the Government in immediate charge of supervision of the work of constructing lighthouses on the Great Lakes, both by the Government and for the Government under contract. He was experienced in lighthouse construction work, as was Assistant Superintendent Norris M. Works who had been in that service for twenty-six years. The drawings and specifications which became a part of the contract in suit were prepared by and under the direct supervision of Works, with the approval of the contracting officer.

6. The project called for by plaintiffs' contract consisted generally in (1) towing a fabricated wooden crib, hereinafter more particularly described, theretofore constructed by the defendant to be furnished to plaintiffs from St. Ignace, Michigan, to the designated site for the lighthouse in Lake Michigan, and there to be properly sunk so as to rest level on the bottom of the lake, which at that point had a depth of about 26½ feet; (2) preparing the crib by filling the center pockets thereof with crushed stone and the outer pockets with concrete for the erection thereon of a certain

steel and concrete structure and the lighthouse tower; and (3) erecting on the wood and concrete crib, as so prepared and as called for by the specifications, the superstructure of steel and concrete, the fabricated structural steel for which was to be furnished by the defendant and delivered to plaintiffs at Petoskey, Michigan, their base of supplies.

7. The designated site for the location of the lighthouse structure was in the northeasterly part of Lake Michigan, just south of the westerly part of the Straits of Mackinac, about 25 miles from Mackinaw City, Michigan, 32 miles from St. Ignace, and about 30 miles northwesterly from Harbor Springs and Petoskey. The site was completely exposed and was subject to heavy winds, storms, rough seas, and prevailing swells which usually and sometimes occur during and subsequent to the month of September, and are of such severity as to prevent, for a time, floating equipment from remaining anchored at or tied to the crib so as to successfully carry on operations. These conditions were usually accentuated as the fall and winter seasons advanced. After September 15 the working season on a project of the character undertaken by the plaintiffs in that location is practically at an end. During times of strong wind and rough sea, work at this site was naturally difficult and slow. Weather conditions at the site of the work during the performance by plaintiffs of their contract were not unusual or extraordinary as compared to the weather conditions usually obtaining and to be expected thereat.

8. The wooden crib constructed and furnished by defendant consisted of 27 courses of 12″ x 12″ timbers as an outside shell, the inner portion of which was divided into 49 substantially square pockets by timbers similarly constructed for the full depth of the crib. The crib as so constructed was 64′ square and 27′ ¾″ deep. It contained 25 central pockets, with cross members at about 8-foot intervals, and also 24 outer pockets around the four sides, inside the crib. The four corner outer pockets were each 5′ 6″ square and 27′ ¾″ deep. The remaining 20 outer pockets were approximately 5′ 6″ x 8′, and of the same depth. Over the entire area of the bottom of the 25 central pockets of the crib there was constructed a 6″ x 12″ plank grillage for the purpose of

preventing the crushed stone, which was to be placed in these central pockets for the purpose of sinking the crib and later to be completely filled with crushed stone, from escaping into the water during the process of submerging the crib. As a part of the crib as constructed and furnished by defendant, there was a 10′ x 1/4″ steel sheet around the perimeter of the crib, which, when the crib properly rested securely on the bottom of the lake, would extend about 4½′ above the top of the water level and about 5½′ under water—this steel sheet being bolted to the timber structure, and on the inside braced to the timbers by knee braces. The crib was to be towed by plaintiffs to the site of the work and properly sunk. Paragraphs 15 and 16 of the Common Clauses of the specifications with reference to sinking and leveling the crib are as follows:

> 15. LEVELING BOTTOM FOR CRIB.—It is believed that it will not be necessary to level or prepare the bottom of lake at site to receive the crib. All necessary leveling to be accomplished in the process of sinking by loading the crib to bring crib in contact with bottom and with top to desired level and then depositing a proper amount of gravel or crushed stone into the outer pockets (which are open at bottom without grillage) and into the center pockets to fill vacant spaces under grillage through the openings between grillage plank. (See paragraph 12.)
>
> 16. SINKING CRIB AND FILLING WITH STONE.—The crib shall be sunk at the very earliest possible date after order to proceed is given and after essential preparations have been completed, as quickly as practicable.
>
> The approximate amount of stone required to fill the crib has been figured to be about * * * 1,740 cu. yds., more or less, for Grays Reef.
>
> Contractor should secure advice from U. S. Weather Bureau as to probable weather conditions to be expected in the following days before starting to tow crib to site in order to start out with greatest probability that weather conditions will be favorable until crib is safely landed on bottom and the 25 central pockets filled with stone.
>
> If practicable, it will be very desirable that the entire load required for sinking shall be placed on temporary plank platform on deck of crib, in stone skips or other convenient form so as to insure quick placing with a derrick and quick removal if necessary. However, in any event at least one half of the load required to

ground the crib should be placed on top of crib, in form readily and removed [removable] by derrick.

When crib has been landed on bottom and full assurance had that crib bears properly on bottom and that crib will be level within reasonable limits, the 25 center pockets shall be filled as rapidly as possible with seven inch "furnace" or "conveyor" stone, or stone of about that size which will fill the pockets of crib compactly and give the crib maximum weight. The filling stone should carry enough small pieces of gravel to reduce the voids to about 20% if practicable.

The 24 outside pockets of crib to be protected against accidental filling with stone by plank covering or by care in the operation of stone filling.

The operation of placing and sinking and filling the crib, once begun, shall be continued without interruption until the 25 central pockets have been fully loaded and crib is absolutely secure.

In case contractor considers necessary, in order to make the crib entirely safe against displacement by storm and sea, he should add such additional weight above top of crib as he considers necessary.

Care shall be exercised to insure that sides of crib are sunk square with the points of the compass, as will be determined by the Inspector in Charge.

The 24 outside pockets of the crib were to be filled with concrete by the tremie process, that is, delivered to the bottom of the pocket through a pipe, under force, so that the concrete aggregate would not be separated by the water. These 24 outer pockets required approximately 1,740 cubic yards of concrete, as estimated by the defendant and plaintiffs. After these pockets had been filled with concrete and the 25 center pockets completely filled with crushed stone, the structural steel grillages and columns were to be secured to and constructed on top of the crib and a concrete slab, 6 feet thick, containing approximately 833 cubic yards of concrete, was to be poured over the entire area of the top of the crib. Paragraph 17 of the specifications entitled "Filling 24 Outer Pockets of Crib with Concrete thru Tremie" provided that "Immediately following the sinking of the crib by the filling of the 25 inner pockets with stone, the 24 outer pockets of crib shall be filled with concrete, placed in the water-filled pockets thru a tremie pipe." The crib was so constructed

that three outer pockets could be substantially filled with concrete in one operation without moving and replacing the tremie pipe.

9. When plaintiffs submitted their bid, and at the time the contract was awarded to them and they were notified to proceed with the work, they did not own or possess suitable and adequate floating equipment necessary for the carrying on of the work. About August 1, 1934, pursuant to an advertisement issued by the defendant, plaintiffs purchased from the defendant the old lighthouse boat *Elm*, of about 219 tons displacement. The hull of this boat was staunch and strong, but the propelling equipment and machinery were old and worn and were subject to frequent failures and breakdowns. The boat had been used by the defendant many years in the Lighthouse Service, and the reasons for the decision to dispose of the same were that the speed of the boat was slow and the propelling machinery thereof was old and required considerable attention to keep it in proper operating condition. The maximum speed of the boat at the time it was sold was about 5 miles per hour under favorable conditions. This boat was equipped with a derrick with a wooden boom. This boat was not suitable or adequate for properly carrying on the work called for, either as provided for and contemplated by the specifications or in the manner in which plaintiffs contemplated carrying on their operations.

10. Plaintiffs did nothing in the way of beginning actual operations under their contract between the date of notice to proceed, August 8, until August 30, 1934. On the last-mentioned date plaintiffs were at St. Ignace with a seagoing tug which they had rented for the purpose of taking the crib to the site where the lighthouse structure was to be erected. On the morning of September 1, 1934, the crib was towed to sea and arrived at the site the same day. Plaintiffs also had along on this trip another rented boat which carried 230 gross tons of ¼″ to 2″ stone, 2,057 gross tons of ¼″ to 6″ stone, and 3,263 gross tons of open hearth stone, for the purpose and use of sinking the crib. The crib was sunk on September 3, 1934, by the use of certain of this crushed

stone in the center pockets and certain of the large stone on top of the crib.

11. As hereinbefore found the specifications in describing the manner in which the crib should be sunk set forth what should constitute complete sinking of the crib, and stated in paragraph 17 that immediately following the sinking of the crib by the filling of the 25 center pockets with stone, the 24 outer pockets should be filled with concrete. Prior to this paragraph of the specifications, paragraph 4, entitled "Camp Facilities," stated in connection with Grays Reef work that "because of its very remote and inaccessible location, it appears that it will be necessary for contractor to provide a camp for quartering and caring for working force. It would appear that the use of floating plant which can be kept 'on the job' nearly continuously, suitable for the provision of quarters, would be necessary." Following this provision this paragraph of the specifications further stated as follows:

> In case contractor desires he may use the old steel building and tower at the old abandoned Waugoshance Lighthouse, located about 4 miles northeasterly. It would be quite practicable to establish a camp right at the site in the upper story of the steel building, soon after the sinking of the crib and the erection of the steel.

Paragraphs 25 and 26 of the specifications are as follows:

> 25. SCHEME OF CONSTRUCTION FOR PIER SUPERSTRUCTURE (up to elev. 21′6½″).—The U. S. will furnish to the General Contractor under this proposal, and he shall erect, standing on top of the timber crib, the complete system of steel framing shown within the concrete pier, below the main deck (elev. 21′6½″) consisting of steel channel grillage fastened to timbers of crib (see Sheet 9), steel columns, beam system at storage floor level and beam system at engine room floor level and beam system at Main Deck Level. Also the "Battle-deck" type steel flooring at Engine Room Floor Level and at Main Deck Level. This steel flooring being made up of convenient sections 24″ wide of ⅛″ steel plate combined with 4″ channels welded to margins of plate. The sections to be swung into place and bolted together thru the webbs of the channels.

This steel flooring will serve as a construction or working deck or platform at once on the erection of the steel, it will also serve as permanent forms for the pouring of the reinforced concrete floor for engine room and for main deck. The above described column and beam system will also serve as a rigid frame to which the contractor will secure the outside and inside forms for the four-foot thick outside vertical concrete walls of pier.

26. Camp site.—In case contractor so desires he may also erect at once the steel building above main deck and construct a temporary camp in the second story or on the roof of building so as to provide quarters for working forces at site, immediately following the sinking of crib and the erection of the steel.

It is suggested that camp could be constructed within the beam system of the upper story of building in such fashion, keeping roof below Roof Deck beams and bar joists, that the construction of buildings and tower could be proceeded with without disturbing the camp until structure was well advanced towards completion.

The specifications on page 34, in referring to Item 1A, page 4 of Schedule A (which was the item of the schedule in which plaintiffs made their bid price and stated period for completion), provided as follows:

This provides for the construction of the station all as shown by plans and described by specifications.

So constructed, using the steel furnished by the U. S., there will be a system of beams at storage floor elevation and at main deck elevation (21′6½″) supported by interior columns, and by 24 outer columns, and with the sway bracing as shown on Drawing 34030, Sheet #14.

There will also be a permanent steel floor or platform at machinery floor and at main deck, which will serve contractor as construction platforms and will also serve as permanent forms for the concrete floor slab and deck slab.

The 24 outer columns will provide a convenient and substantial support to which the forms for outer concrete walls may be fastened.

All steel framing and flooring furnished by U. S. to general contractor for erection.

The steel flooring ("Battle Deck Type") made of ⅛″ steel plates 24″ wide, with 4″ channels welded to edges of plates, will come to the job in convenient

lengths ready to swing into place and quickly bolt together thru the webb of 4″ channels, providing a substantial working platform at once (at main deck level and at machinery room floor level) on the erection of the steel, convenient for carrying on the subsequent operations of building the station.

Plaintiffs had planned to carry on their operations as follows: After the crib had been towed to the site and brought in contact with the bottom of the lake by the placing of stone in the center pockets and on top of the crib, which was done on September 3, 1934, to erect upon the crib while in that condition the structural steel framework up to the main deck, which was 21′ 6½″ above the top of the crib, and to establish in this steel framework at certain floor levels indicated in paragraph 25 of the specifications, *supra*, a working platform, on which they contemplated placing concreting equipment and materials for the purpose of pouring the concrete necessary to fill the 24 outside pockets of the crib and the 6-foot thick concrete "main slab" immediately on top of and over the entire area of the crib. Plaintiffs under this plan had estimated that they could complete the construction of this portion of the structural steel framework of the superstructure for the establishment therein of a complete concreting plant and camp site within from one to two weeks from the date on which they had sunk the crib in the manner above-mentioned. Plaintiffs did not with their bid or at any other time submit to the contracting officer a progress schedule for the performance of the work called for by their contract. Plaintiffs, however, did at sometime (the exact date has not been satisfactorily shown by the record) state to Supervising Engineer Works that their contemplated plan of operation in this connection was substantially as above mentioned.

12. On the morning of September 4, 1934, Herman and Chester Greiling, accompanied by the defendant's foreman and inspector, L. H. Comfort, started for Petoskey on the boat *Elm*, and after having stopped at Harbor Springs, arrived at Petoskey on September 5 for the purpose of obtaining and transporting to the site of the work certain of the specified structural steel to be used in the structure. The

structural steel at that time had not been delivered at Petoskey by the defendant for the reasons hereinafter set forth. Thereupon Chester Greiling returned to the crib on the boat *Elm*, arriving at 10:55 a. m. on September 7, and began leveling the stone over the area of the 25 center pockets of the crib, and doing other work of preparing the top of the crib for the purpose of erecting thereon the steel grillage, columns, and framework described in the specifications. Herman Greiling did not return to the crib at that time but proceeded to the office of Supervising Engineer Works to request delivery of the structural steel and to ascertain why it had not been delivered at Petoskey. He was informed by Works that the steel had not arrived, due to a strike at the steel mill where it was being fabricated under a contract which had been let therefor in July, but that he had been expecting, and then expected, that the strike would be settled shortly and that the steel would be available for delivery within a short time. This was on the 6th of September. The following day, September 7, Herman Greiling and Superintendent Works had a conference in the latter's office with reference to the matter, and, upon the basis of the information which Works then had, he advised Greiling that due to the strike, which had not been settled, the structural steel probably would not be available in time for use during the 1934 working season, which under the contract ended November 1, 1934.

Bids for the fabrication of the structural steel had been opened on July 9, 1934, and, in submitting bids to the contracting officer, Works had recommended that contracts for the steel to be used in the construction of Grays Reef Lighthouse be awarded in part to one bidder and in part to another, and requested that the matter of awarding the contract or contracts for the steel be decided at the very earliest date and that he be advised by wire, in view of the urgency that the steel be fabricated and delivered at an early date. The contracting officer awarded the contract for the steel to Worden-Allen Company on July 25, 1934. In the normal course of business not more than 30 days were required to fabricate and deliver the structural steel, according to the bids and proposals therefor, for the super-

structure of Grays Reef Lighthouse, though it was possible for the steel company to whom the contract was awarded to fabricate such steel within ten days under normal conditions if it so desired. However, on August 7, 1934, a strike occurred in the Worden-Allen Company plant. Supervising Engineer Works had information about that time that the strike had occurred but he had no information or reason to believe that the strike would not be settled shortly or that there would be any delay in the delivery of the steel by Worden-Allen Company in time for its use in the construction of Grays Reef Lighthouse as contemplated by the contract and specifications of plaintiffs.

13. When plaintiffs requested delivery of the steel on September 7, the only floating equipment which they had was the boat *Elm*. It was not suitable or adequate for the purpose of speedily transporting materials over the distance of 30 miles to the site of the crib, or for the purpose of carrying on concreting operations from the deck thereof necessary to fill the 24 outer pockets of the crib with concrete by the tremie process and the storing on the boat of sufficient concreting equipment and materials for that purpose. Due to the slow speed of this boat it required a period of ten hours under normal and favorable conditions for it to make a round trip from the site of the crib to Petoskey and return. Experience with this boat had shown that considerable trouble and delay were being encountered due to failure of the propelling machinery and equipment of the boat to properly operate and due to frequent breakdowns thereof.

At the conference between Herman Greiling and Supervising Engineer Works on September 7, the latter suggested, in view of the situation and as a means of assisting plaintiffs, and in view of the equipment possessed by them being inadequate, that a temporary timber arrangement be substituted for certain structural steel, the use of which would enable plaintiffs to proceed in the manner they desired, the timbers to be used being 12″ x 12″ pieces to be used as columns and beams and 2″ x 12″ planks to be used as platforms, and other needed lumber. Works advised plaintiffs at that time that defendant would furnish

the timbers, have them loaded on its lighthouse steamer *Sumac*, and delivered to and unloaded on the crib, and that defendant would also furnish and deliver on the crib sufficient erection bolts, washers, etc. This offer of the supervising engineer was approved and accepted by Herman Greiling.

Neither at that time nor at any other time before or subsequent to September 7 did Supervising Engineer Works or the contracting officer admit or decide that plaintiffs had arrived at the point in the progress of the work as contemplated and called for by the contract and specifications where the structural steel was required to be erected, or under the terms of the contract and specifications the defendant was then obliged to make delivery of the steel. September 7 Works prepared a drawing and made a blueprint therefrom showing the proposed plan for erection of the temporary timber framework and platform, and on the same day wrote plaintiffs a letter enclosing the blueprint, as follows:

> Mr. Herman Greiling was at this office today and several matters of importance were gone into.
>
> We advised that due to the strike in the plant of the Worden-Allen Co., we have given up hope of being able to get the Steel Building and tower for erection this fall. But of greater importance is the fact that it now appears that we will be unable to secure the steel framing, columns, beams, steel floor in time for erection by you in connection with pouring the concrete pier and slabs. There is still a possibility of the latter but the possibility appears so remote we feel that precautions should be taken so as to permit going ahead with your concrete work.
>
> Mr. Herman Greiling approved that the following arrangements be made:
>
> Our Tender *Sumac* will go to Charlevoix tomorrow, and will load surplus timber and plank which we have there and will deliver same on the Grays Reef Crib about Tuesday or Wednesday, the 11th or 12th Sept.
>
> This material to be used in constructing the timber working platform, for occupancy by your concrete mixer, up some 21 ft. above top of the crib, all as shown by the inclosed Dr. 34280.
>
> The timber columns to occupy the exact positions, which will later be occupied by the steel columns.

> Before erecting these columns you will dig out the rock fill of the crib somewhat under each column and put in a concrete mass, to bear the weight of the column, and later to bear the weight of the steel column, pending the time until it is concreted in place.
>
> The drawing is intended only to indicate the general type of the platform, you would build it to suit your requirements.
>
> With the timber columns in place you will build about each a box form, the full depth of the slab, about 2 to 3 ft. square, which will core out a hole thru the slab at the site of each column, so that you will later withdraw the wood columns and set in place the steel columns and at that time concrete the steel columns into the holes.
>
> Such forms to be built for all of the 16 central columns, but also for the 24 outer 6″ columns near the outer margin of the crib.
>
> We will arrange for the delivery at Petoskey of the necessary bolts, washers, and spikes.

September 10, 1934, Works wrote and delivered to plaintiffs the following letter, copies of which were delivered to defendant's Inspector Comfort and to the Master of the lighthouse steamer *Sumac:*

> Referring to the work at Grays Reef, we sent you Dr. 34280 a day or two ago, showing the framing of temporary Platform, of timber for mounting your concrete mixer on.
>
> We hand you with this a revised copy, on which we have added additional data and drawing showing a suggestion for forming out the holes in the 6-ft. slab for the 40 steel columns to stand in, when they are delivered.
>
> This drawing is only suggestive, and you should handle the matter as you choose.
>
> The Lighthouse Steamer *Sumac* will leave Charlevoix on Wednesday with the timber and plank for this elevated platform and for the 40 forms.
>
> The *Sumac* will purchase the spike[s] in Charlevoix and bring.
>
> We are shipping the bolts and washers for the forms from Milwaukee tonight by EXPRESS to Charlevoix, and the *Sumac* will bring on Wednesday, except 90 short threaded rod bolts, for use in splicing the planks together, which serve as joists under the platform.
>
> These 90 threaded ¾″ x 6″ rods for bolts will be shipped by express tomorrow, to GREILING BROTHERS,

Lighthouse Contractors, Care Petoskey Portland Cement Co., Petoskey, Mich.

The *Sumac* will deliver the above direct on the Grays Crib, on Wednesday, as it is understood that you will have the stone fill leveled off on the crib by that time so that you can receive this material.

N. M. WORKS.

Copies to Comfort at Petoskey and to Greiling at Green Bay and to Master *Sumac* at Charlevoix.

Between September 9 and 12, 1934, the *Sumac* loaded 21 12″ x 12″ timbers, 18 of which were 20′ long, 2 were 30′, and 1 was 32′. It also loaded 144 planks 2″ x 12″ x 16′, and in addition the bolts, spikes, washers, etc., mentioned in the letter of September 10. The other bolts mentioned in that letter were also furnished. The *Sumac* with this material arrived at the site on September 12, but, on instructions from Herman Greiling, it unloaded only 6 of the 12″ x 12″ timbers and 18 of the 2″ x 12″ x 16′ planks and took the balance of the timber to the Petoskey Cement Company's dock to be later picked up by plaintiffs and taken to the site of the work as needed. Plaintiffs did not erect any of these timbers but decided to pour concrete by use of floating equipment. September 15, 1934, plaintiffs chartered the barge *Dahlke* from Ecorse Transit Company of Detroit and put it in use on the 25th. It was used for the transportation of materials and supplies to the crib and for quarters for plaintiffs' employees, and part of the concreting machinery was erected on this barge and it was used thereafter in the work of filling certain of the 24 outer pockets with concrete. The *Dahlke* arrived at Harbor Springs September 25 and made its first trip to the crib; it arrived there September 29, and made another trip on October 4. During all this time, to the date last mentioned, plaintiffs were experiencing difficulty in the operation of the boat *Elm* by reason of the fact that it was subject to frequent failures and break-downs. No unusual weather conditions occurred until September 26, 1934. A strong northwest wind on September 27 did considerable damage to the interior of the crib—breaking up planking, washing ballast rock out of certain of the center crib pockets adjacent to the outside pockets of the crib, and the two southerly ice-

protection steel plates on the east side of the crib were forced out of alignment due to the shearing off and carrying away by the storm of the two L wall braces. The steel plates were pulled back in place with chain blocks and bolts were placed through plates and certain 12″ x 12″ timbers were used as a temporary measure until final repairs were made by plaintiffs November 3. Plaintiffs' concrete mixer arrived at Petoskey September 18 and was later installed on a platform on the barge *Dahlke*. The first pouring of concrete in the outer pockets of the crib was made on the afternoon of October 4, 1934, thirty days after the crib had been brought in contact with the bottom of the lake and was ready for the filling of the 24 outer pockets with concrete, and nearly two months after plaintiffs had been ordered to proceed with the work called for by their contract. Due to rough seas plaintiffs were unable to pour concrete between October 4 and 18, or a total of 9 days. During the period October 4 to 19 plaintiffs, by use of the barge *Dahlke*, succeeded in filling six of the outer pockets of the crib with concrete. During this time the boat *Elm* was not operating properly and was subject to frequent break-downs and, on some occasions, plaintiffs had to use the barge *Dahlke*, from which concreting operations were being carried on for the purpose of transporting materials. On October 9, due to the condition and inadequacy of the *Elm*, plaintiffs chartered a boat *Henry Cort* for the purpose of transporting a load of stone to the crib.

October 14, 1934, Supervising Engineer Works and G. P. Skinner, from the office of Contracting Officer Hubbard started to the site of the work for the purpose of obtaining first-hand information as to the progress being made and as to the condition of the work as done to that date, but a severe storm arose which did not wholly subside for about three days. During this period Works and Skinner had a conference with Herman and Chester Greiling, and the defendant's officers advised plaintiffs under the circumstances to discontinue concreting operations for the winter and proceed to protect the crib with heavy stones until the beginning of the working season in the spring of 1935. Plaintiffs did not consent to this as they had the barge

Dahlke under charter and, since it was rigged up and prepared for concreting operations, they desired to continue to use it and to complete as much of the work of concreting the outer pockets of the crib as they could and to utilize the stored materials which they had purchased and had on hand on the *Dahlke* and on the crib. Up to that time plaintiffs had completed concreting six pockets, and by October 19 they succeeded in pouring three additional outer pockets, at which time Supervising Engineer Works, acting for the contracting officer, ordered plaintiffs to stop the work for the winter, due to weather conditions and for the safety of the work. Thereafter, between that date and November 25, 1934, the barge *Dahlke* was used to transport to the crib sufficient crushed and large rip rap stone to fill the remaining 15 unconcreted outer pockets with crushed stone, and to otherwise properly secure the crib from damage during the winter months and until the beginning of the working season in May 1935.

Assistant Superintendent Works ordered the work suspended on or about October 19, 1934, due to the then condition of the work, the prevailing and expected weather conditions and fall gales, and for the safety of the crib. Plaintiffs were able to pour concrete on certain dates between the date of the storm on October 14, and the date when work was suspended on October 19, and succeeded in concreting only three additional outer pockets. Paragraph GR–5 of the specifications provided that the defendant would maintain and care for the crib until plaintiffs took the crib away from St. Ignace for sinking at the site of the work and that "after that the care and responsibility for the crib and lighting of same shall rest wholly on the contractor until the completion of the contract." When given instructions that work be suspended and that the crib be made secure from damage for the winter months, plaintiffs were instructed to follow this plan: (1) to fill the 15 remaining outer pockets with crushed stone, which required about 1,013 tons; (2) to remove certain small stone with which the central pockets had been filled and to place therein and thereon heavier stone; (3) to pile heavy rip rap stone, weighing from three to ten tons each, on top of

the stone placed in all the pockets of the crib for the safety of the crib to prevent the small stone placed therein from being washed out, and (4) to place a row of timbers along the outside of the sheet steel plate to reinforce the knee braces.

14. Plaintiffs had expected under their plan of operation to be able to finish the filling of the 24 outer pockets with concrete and to pour the 6-foot thick main slab during the 1934 working season, thereby making the crib safe for the winter without further preparation for its safety.

15. The usual, customary, and most practical way and method of operation in constructing lighthouse foundations of the character called for by the plaintiffs' contract and specifications was to completely sink and secure the crib by the filling of the center pockets with crushed stone and the concreting of all of the outer pockets from operations carried on with suitable and adequate floating equipment. This was the method employed and the procedure followed by the Government and private contractors in the construction of a number of other lighthouses on the Great Lakes. If plaintiffs had owned or possessed suitable and adequate equipment for carrying on the work called for by their contract at or about the time they were given notice and directed to proceed, they could easily have completed the work of filling the 24 outer pockets of the crib with concrete before it became necessary to suspend the work in the fall of 1934. While it was possible to erect upon the crib the steel grillages, columns, and certain of the steel framework after the crib had been sunk by the filling of the center pockets with crushed stone, and to carry on the concreting of the outer pockets by the placing of concreting equipment and materials on the crib or on the platforms constructed in the steel framework, this method of operation was impracticable. It was practicable to carry on concreting operations for concreting the outer pockets with equipment and materials placed on the central area of the crib, which area had been filled with crushed stone.

16. *Rip Rap Stone.*—When work was suspended, as heretofore stated, in October 1934, plaintiffs purchased, transported, and placed on the crib 340 net tons of heavy rip rap

stone, each stone weighing from two to ten tons. Pursuant to instructions which had been given for securing the crib for the winter months, this stone was placed on top of the small crushed stone with which the center and unconcreted outer pockets of the crib had been filled, in order to give weight to the crib and prevent the crushed stone so placed in these pockets from being washed out. The cost of this stone, which was equal to about 272.38 cubic yards, was $493.70. When operations were resumed by plaintiffs in May 1935 this stone was removed and was used as directed by Assistant Superintendent Works, by being placed around the crib as additional protective rip rap for the lighthouse foundation. Works informed plaintiffs when they placed this stone around the crib as additional rip rap that he would recommend payment therefor. Later plaintiffs presented a bill for the original cost plus the cost of handling and placing this stone at $5 a net ton, or $1,804.54. The contracting officer considered the same and upon the facts before him decided that plaintiffs were entitled to $1,089.52 for this stone, at $4 a cubic yard for 272.38 cubic yards. He disallowed and denied the excess claim of $715.02.

The bill of plaintiffs for this material and work was submitted on October 19, 1936, with the consent of the contracting officer, after the work called for by plaintiffs' contract had been completed and accepted on September 2, 1936. This item was included among the items set forth in certain other claims made by plaintiffs to the contracting officer in October 1936, and to the head of the department by appeal, as hereinafter more fully stated. The decision of the contracting officer on this item was approved by the Secretary of Commerce under the finding which he made that from an engineering standpoint this extra large stone served a material and useful purpose as additional protective rip rap for permanent protection of the crib and that plaintiffs were entitled to an equitable adjustment for the same, which he concluded, as had the contracting officer, was $1,089.52, $4 a cubic yard for 272.38 cubic yards. Inasmuch as final administrative payment under the contract had been made when the contract work was completed September 2, 1936, and when the Secretary of Commerce

made findings and decided plaintiffs' claims on appeal early in June 1937, the matter of payment of this and certain other allowed items of the claim, hereinafter mentioned, under the findings and decision made, was sent to the Comptroller General June 25, 1937, for direct settlement, but payment was not made for the reason that plaintiffs had on May 5, 1937, instituted suit in this court.

17. *Small Crushed Stone, $750 claimed.*—In securing the crib for protection purposes in the fall of 1934 plaintiffs placed about 1,013 tons of crushed stone in the 15 unconcreted outer pockets. During the winter, and before the resumption of operations in the spring of 1935, a small portion of this crushed stone was washed away by action of the sea and the balance when removed from these pockets in 1935 was used as concrete aggregate under the provision in the contract that plaintiffs should furnish all stone necessary for concreting purposes. February 17, 1935, plaintiffs first made claim to the contracting officer for $1,972.16 in connection with crushed stone which had been used during the winter of 1934 in the outer pockets to protect the crib for the winter and, again, on February 12, 1936, they submitted a claim for $3,111.92. On October 14, 1936, the contracting officer wrote plaintiffs with reference to these two items of their claims, among others, in which he stated his finding to be that not more than 9.296 cubic yards of crushed stone used to fill the outer pockets of the crib during the winter months of 1934 had been lost or washed away and that, at $23.88 a cubic yard, the total cost of such stone was $221.99. He further advised that he would approve the claim in the amount of $221.99 and recommend payment. Thereafter, on October 24, 1936, plaintiffs filed their original appeal with the Secretary of Commerce and, in that appeal, did not include this item but subsequently, on or before February 5, 1937, they amended their appeal so as to include a claim for $3,000 for additional crushed stone for "The additional cost of crushed stone and the handling of same required to fill the unfilled tremie concrete pockets in October and November 1934, to secure the crib." Upon consideration the Secretary of Commerce, on findings of fact made that the crushed stone placed in the

outer pockets of the crib in 1934 was required for winter protection of the crib and was therefore a responsibility of the contractor and that the Government was not liable under the contract to reimburse under the facts which made it necessary that these outer pockets be filled with crushed stone in the fall of 1934, or, under any provisions of the contract, to reimburse plaintiffs for the cost of any crushed stone so placed in the pockets that may have been washed out during the winter months or for the expense of handling such stone, either in the fall of 1934 or the spring of 1935, this item of the claim on appeal was denied. This decision of the Secretary of Commerce was correct. The fair cost to plaintiffs for the crushed stone washed away was $221.99.

18. *The Dahlke—Charter Hire and Expenses, $19,455.95 claimed.*—As hereinbefore mentioned, plaintiffs chartered the barge *Dahlke* September 15, 1934, and brought it on the work at the base of supplies on the 25th. It was thereafter, and until the crib was secured for the winter, used as hereinbefore indicated for transporting supplies, carrying on concreting operations, whereby nine of the outer pockets of the crib were filled with concrete, and for housing employees. The boat *Elm*, which was the only floating equipment owned by plaintiffs, was insufficient and inadequate for transporting materials, the carrying on of concreting operations, or for housing employees. The boat *Elm*, in the condition in which it was during the working season of 1934, was not sufficient or adequate for the rapid transportation of materials and supplies. The use of a boat in addition to the *Elm* was necessary in order that plaintiffs might properly and adequately carry on the work during the period from the date of notice to proceed on August 8, 1934, until the work was suspended in November 1934. The *Dahlke* was chartered and used by plaintiff 79¾ days at $120 a day, totalling $9,570.

Under the charter agreement the Ecorse Transit Company agreed to procure full marine coverage, and plaintiffs agreed to pay their pro rata share for the insurance premiums while the barge was in their service and also to pay all costs of operation and of any repairs. The total operating cost of

this barge to plaintiffs, including the charter hire of $9,570, was $19,455.95.

Claim was made for the amount last above-mentioned on the ground that the use of the *Dahlke* was made necessary by reason of the failure of the defendant to furnish structural steel when requested on September 6, 1934. This claim was first asserted by plaintiffs October 24, 1936, and again on October 30, 1936, in a letter to the contracting officer. The contracting officer found as facts that plaintiffs' delay in successfully carrying on the work and completing the same, during the period of 257 inexcusable days of delay beyond the contract date for completion, was not the result of the unavailability of the structural steel in September 1934; that plaintiffs' floating equipment, which consisted only of the boat *Elm*, was insufficient, unsuitable, and inadequate with which properly to carry on and prosecute the work as called for by the contract, and for these reasons he decided that no portion of this claim was allowable, and for the further reason that the contract and specifications contemplated and provided that the 24 outer pockets of the crib should be filled with concrete immediately following the filling of the 25 center pockets with crushed stone and before the erection of the structural steel. He therefore denied the claim, and on appeal the Secretary of Commerce approved the decision of the contracting officer and denied the claim on the facts and for the same reasons. The decisions of the contracting officer and the Secretary of Commerce as to the facts on the basis of which they rejected this claim were not arbitrary or grossly erroneous.

19. *The Repairs to Sheet Metal Plate around the outside portion of the Crib.*—The specifications, paragraph GR–5, Special Clauses, provided, as hereinbefore mentioned, that the United States would care for the crib until plaintiffs took it away for the purpose of sinking it at the site, but that after that time the care and responsibility for the crib would rest wholly on the plaintiffs until the completion of the contract. The ice protection steel plate of the crib was damaged by a storm on October 14, 1934, a portion thereof being shoved out of alignment by the shearing off and carrying away of two L wall braces. The defendant's inspector di-

rected plaintiffs to repair the damage, which they did, by welding, straightening and strengthening the armor plate and placing certain 12″ x 12″ timbers (which had theretofore been delivered on the crib by the defendant) around the steel plate. The total cost to plaintiffs of making these repairs to the crib was $395, which included $167.82 paid to the Paige Welding Company.

Plaintiffs made claim for this expense to the contracting officer who, upon the facts as above mentioned and under the provision of the specification above referred to, denied the claim. Plaintiffs took no appeal from this decision. The decision of the contracting officer was not arbitrary or grossly erroneous.

20. *Extension of Time.*—When plaintiffs discontinued operations November 25, 1934, the work called for by their contract was at that time not more than 37 percent complete. Article 9 of the contract specified that as the actual damages to the Government for delay in completing the contract within the time agreed upon would be impossible to determine, in lieu of such damages the contractor agreed to pay to the Government as fixed and agreed liquidated damages for each calendar day of delay until the work should be completed or accepted the amount as set forth in the specifications, but that the contractor would not be charged with liquidated damages because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, acts of the Government, strikes, and unusually severe weather. This article further provided that "the contractor shall within ten days from the beginning of any such delay notify the contracting officer in writing of the causes of delay, who shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned, whose decision on such appeal as to the facts of delay and the extension of

time for completing the work shall be final and conclusive on the parties hereto."

Paragraph J, page 2 of Schedule A, entitled "Liquidated Damages," provided: "As time is considered as of the essence of the contract, liquidated damages shall apply in the amount of: one-tenth of one percent of the contract price, plus three dollars for each day's delay beyond the time named by bidder for completion. The maximum amount that will be deducted will not exceed ten percent of the value of the contract." Under this provision the amount of liquidated damages for each day's delay for which the contractor was responsible was $111.59, and the total period of delay necessary to equal the maximum liquidated damages of 10 percent was about 97 days.

During the fall of 1934 plaintiffs made applications, verbally and in writing, to the contracting officer, through Supervising Engineer Works, for extensions of time by reason of unusually severe weather and on the ground that the defendant had failed to furnish the fabricated structural steel when needed and as required by the contract and specifications. The contracting officer did not make decisions in each instance upon the facts existing and compiled by him with reference to what extensions of time should or should not be granted, but in the circumstances advised plaintiffs to submit to him once each month a picture of the situation as to causes of delay and requests for extensions so that they could be coordinated and a record with reference to the existing conditions made as the work proceeded, and he stated that decisions would later be made and an adjustment of time extensions for the causes asserted, where proper, would be made in the final handling of the account. Plaintiffs agreed to this arrangement.

December 15, 1934, following the suspension of work for the winter on November 24, plaintiffs wrote the contracting officer, through Construction Engineer Works, as follows:

> We are submitting herewith for your favorable consideration the application for an extension of time on our contract covering the general construction of Grays Reef Light Station.

Justification for this extension of time is based on the fact that the structural steel was not supplied, for erection and use by us, on September 5th, 1934, or any date later during the 1934 construction season. After the crib had been sunk, in early September, our whole plan of construction was necessarily changed because the steel was not delivered as we had anticipated. It was our plan from the start to erect living quarters in the building, at the 21′0″ elevation, and keep the necessary men at the site of work. In addition to this, our entire plant was assembled with the thought always in mind that the concreting unit would be placed in the structural framework at the lower elevation, thus making easy the pouring of all the 1,600 cu. yds. of tremie concrete.

After the crib had been sunk and the steel not delivered as anticipated, we made every effort to pour the tremie concrete in the crib pockets from a floating plant, but the inclement and unusually severe weather conditions encountered did not permit the floating plant to lay at the crib in long enough periods to accomplish any appreciable amount of work. During the month of November the longest period we were able to lay at the crib and work was 16 hours.

All the time we put in during November, in addition to some spent the latter part of October, was for the purpose of protecting the crib and safeguarding the work for the winter period. Of necessity, this resulted in great expense to us because of the extended periods the boat was forced to lay in because of heavy weather. No effort was spared to complete this work as early as possible, but the unusually severe weather which prevailed would allow no more work than that which was done.

On the same day plaintiffs also wrote the contracting officer, through Works, outlining the method of procedure which they proposed to follow on the resumption of work in 1935 and the period within which they expected to complete the work called for by the contract and specifications, as follows:

We submit herewith an outline of the method of procedure we propose to follow in completing the construction of Grays Reef Light station.

As soon as weather permits, after May 1st, 1935, we will proceed to uncover a portion of the crib sufficient in size to erect the substructural frame and build our

living quarters therein. The concrete plant will be assembled and placed in position to pour the remainder of the tremie concrete. Before pouring, however, the crushed stone now in the pockets will be removed from adjacent pockets on opposite sides so as to allow the concrete to be placed. This work is preparatory to pouring one-half of the main slab, which work at this point can be accomplished, after the reinforcing iron is placed. No delay should be experienced as the reinforcing is already at Petoskey, cut to length, and bent as per approved drawings. Along a similar line, the remaining pockets will be poured and the balance of the main slab completed.

Simultaneously with the above work, the forms for the upper structure will be prepared and placed, if practicable, to the roof line. It is our intention to finish such parts of the interior work as require the use of the big mixer, and then replace same with a smaller unit to pour the remaining small bulk of concrete. With the roof slab on, the tower proper will be erected while at the same time the interior of the lower structure can be finished.

With reasonably fair weather conditions, starting May 1st, approximately 20 days will be required to undo the temporary work and restore the crib to the same status as of September 5th, 1934. Work can proceed as above outlined and in approximately 60 days we propose to finish the entire job.

Prior to the time the last above-quoted letter was written by plaintiffs to the contracting officer, that official had repeatedly called to the attention of plaintiffs the existing incomplete status of the contract work and lack of progress that properly could be expected with the equipment they had, with no satisfactory assurance from plaintiffs that additional or suitable equipment could be expected to be used upon the resumption of work in the spring of 1935, and the attention of the surety upon plaintiffs' performance bond had been called to these conditions; and the contracting officer had under consideration the matter of terminating the contractor's right to proceed under Article 9 and of ascertaining the wishes of the surety company in accordance with the matter. In view of plaintiffs' letter of December 15 as to the progress which they promised to make upon beginning operations in 1935, to complete the work

within approximately 60 days, no action was taken under Article 9.

21. *Progress of Work in 1935.*—On May 1, 1935, which was the date specified in the contract for the resumption of operations in the event all of the work called for by the contract should not be completed by November 1, preceding, the contracting officer, due to existing weather conditions, fixed June 1 as the date for resumption of operations, but weather conditions improved and plaintiffs returned to the crib and began work May 14, 1935, and that date was fixed as the day for commencement of the running of time under the contract. The crib as secured upon the cessation of operations in 1934 withstood the effects of storms and rough seas during the period between November 24 and May 14, and was in good condition except that certain plates of the steel protection sheet around the perimeter of the crib had been broken or bent. Upon resumption of work it was necessary for plaintiffs to remove the heavy rip rap stone which had been placed on the crib in 1934 to properly secure the crib against damage, and this stone, with the consent of the contracting officer, was placed about the crib, on the outside, in selected low spots as additional rip rap protection to the crib. It was also necessary to remove the small crushed stone which had been placed in the 15 unconcreted outside pockets of the crib, for the purpose of filling these pockets with concrete as called for by the contract. This crushed stone was used by plaintiffs as concrete aggregate in the process of concreting these pockets and for the making of concrete otherwise called for by the contract. By reason of the fact that there were certain steel bars around and through these outer pockets which had been placed there to strengthen and protect the crib when it was originally constructed, more time was required to remove the crushed stone from these outer pockets than would otherwise have been necessary.

Upon resumption of operations the only floating equipment which plaintiffs had with which to carry on the work was the boat *Elm*, in which the only change had been the erection thereon of a steel derrick boom to replace the former wooden one. In addition plaintiffs had located on top of the crib, in the area of the 25 center pockets

thereof which had been filled with crushed stone, a small tractor crane of the "whirley type." Plaintiffs did not "recondition" the crib upon the resumption of work in May 1935 before commencing the "permanent" work of concreting the remaining 15 outer pockets of the crib by removing the rip rap and the crushed stone from the outer pockets, but carried on permanent work simultaneously with reconditioning work. In other words, when the heavy rip rap had been removed from the top of the crib and placed around it, the crushed stone was removed from certain of the outer pockets and placed over the area of the 25 center pockets on the crushed stone with which those pockets had been previously filled, and as a group of three outer pockets was thus made in condition for concreting, such concreting operation was carried on with the concrete mixing and pouring equipment and aggregate, both located on the crib over the area covered by the 25 center pockets. The work of removing the rip rap stone from the top of the crib and the crushed stone from the unconcreted outer pockets of the crib was performed with the derrick on the boat *Elm*, and this boat was also used for transportation of men, material, and supplies between the base of operations at Petoskey and the site of the crib. Inasmuch as less crushed stone was used in the filling of each group of three outer pockets than was removed from such pockets, a very large amount of crushed stone not needed in the mixing of concrete necessary to pour the remaining 15 outer pockets became piled over the central area of the crib, and under the method of carrying on the work pursued by plaintiffs this great mass of crushed stone aggregate was moved, handled, and worked around on top of the crib and otherwise until they were ready to use it finally in the pouring of the main 6-foot concrete slab. As a result of the manner in which plaintiffs carried on their operations upon resumption of work in May 1935, about 24 days of 8 hours each were used in reconditioning the crib. Plaintiffs' average hourly cost applicable to this work as performed was $53.89, or a total of $10,346.88. This work could have been performed more expeditiously if plaintiffs had had adequate floating equipment on which to store the excess materials removed from

the outer pockets of the crib and subsequently needed and used for concreting purposes. Between May 14 and June 6, 1935, six of the remaining 15 outer pockets of the crib had been filled with concrete. On the last-mentioned date plaintiffs took a portion of the structural steel to the site of the crib. June 20, 12 of the 15 outer pockets of the crib remaining unconcreted at the time operations were resumed in 1935 had been filled with concrete and three pockets remained unfilled on that date. June 20, plaintiffs had erected 9 columns of the steel work on the crib. The remaining three outer pockets were filled with concrete soon after that date.

By July 3rd 22 of the 40 structural-steel columns for the superstructure on top of the crib, together with all beams, girts, and sway bracings, had been erected and bolted in place. By July 31, a total of 20 steel columns with connecting girts and beams had been erected in addition to 14 columns of steel erected during the month of June. At that time the six steel columns on the easterly side of the crib remained to be placed. July 31, plaintiffs had partly fitted up, in the upper portion of the structural-steel framework which had been erected to that date, a rough shack as a camp for the working force, and in that camp accommodations had been arranged for about four men. No working platforms for concreting equipment and storage of materials had to that date been erected in the steel framework. Only 35 of the 40 structural steel columns and beams had been erected by plaintiffs to July 31, 1935, a period of 54 days after the first steel had been taken by plaintiffs to the crib. The balance of the structural-steel framework was erected by plaintiffs during the period from July 31 to shortly after August 12, 1935. Plaintiffs did not complete the work called for by their contract in 1935 and operations were suspended from November 22, 1935, until May 1936. Work was resumed in May 1936, and the work called for by the contract was completed by plaintiffs September 2, 1936.

October 24, 1936, plaintiffs wrote a letter to the contracting officer, through Supervising Engineer Works, making a claim for payment of $10,346.88 for the cost of "reconditioning the crib" in 1935, and on October 30, 1936, plaintiffs

wrote another letter to the contracting officer to the same effect. In deciding this dispute the contracting officer and the Secretary of Commerce, upon the facts before them and the findings made, and upon their interpretation of the contract and specifications, denied and rejected the claim. The findings and decisions of the contracting officer and the head of the department were not arbitrary or grossly erroneous.

22. *Cutting Crib down to Datum, $1,470 claimed.*—Paragraph GR–5 of the specifications provided that the care of and responsibility for the crib should rest wholly with the contractor until the completion of the contract, and Article 3 of the contract provided that no charge for any extra work or material would be allowed unless the same had been ordered in writing by the contracting officer and the price stated in such order. Paragraph 15 of the specifications provided with reference to the placing of the crib that all necessary leveling was to be accomplished by the plaintiffs in the process of sinking the crib by loading the crib to bring it in contact with the bottom "and with top to desired level." Due to the manner in which the plaintiffs sunk the crib, it became out of level while it was being submerged with the weight of stone, and certain crushed stone got under certain portions of the crib, with the result that when the crib had landed on the bottom it had not reached the desired level; after the center pockets had been filled with stone and measurements taken on September 7 from water level to the top of the steel plates, it was found to be out of level due to small stone used in the sinking process getting beneath the bottom of the crib timbers and holding it up at certain points. To correct this condition would have required the unloading of the crib and the releveling of the bottom thereof in the manner indicated in the specifications, which would have been an expensive process and was not justified since the crib had come to a firm bearing. At that time there was also the possibility that the continued weight of the crib filling might bring the crib to the proper level. When plaintiffs began the placing of the structural steel grillages in 1935, it was found that the crib was out of level at certain points about 9 inches. Plaintiffs started to set the steel grillages by an average elevation on top of

the crib, and the defendant's Inspector Comfort directed that the steel grillages be set at datum elevation or level, which as shown by drawing 34030-10 was 578.5. Plaintiffs did this by cutting away some portion of the top timbers so as to place the foundation grillages for the steel columns at the proper elevation. Plaintiffs did this work without protest and the cost thereof was $1,470. This expense was minor as compared to what it would have cost the contractor to actually place the crib at the prescribed level when it was originally sunk in September 1934. Plaintiffs made no claim to the contracting officer for this work until February 12, 1936, and again on September 23, 1936, and the contracting officer on September 24, 1936, denied the claim upon the facts and upon his interpretation of the specifications that this was not extra work, and on the further ground that the work had not been ordered in writing and the price therefor fixed in such order. Accordingly he advised the plaintiffs in writing that "This office had no knowledge of your claim in this matter until the receipt of your bill dated February 12, 1936. This office never authorized any such extra work and considers your claim to be without justification, as the work referred to is fully covered by the contract." This decision was approved by the head of the department.

23. *1936 Operations—Claim for $5,491.35, alleged balance on contract price.*—When plaintiffs, on the commencement of operations on May 27, 1935, removed the crushed stone which had been placed in the unconcreted 15 outer pockets of the crib, they found that, due to the fact that certain concrete and aggregate used in concreting certain of the outer pockets in the fall of 1934 had fallen over into certain of the pockets which were not concreted before ceasing operations in November 1934, through a break in certain metal bulkheads placed across every third outer pocket, and had solidified near the bottom of the crib with the crushed stone which had been placed in the unconcreted pockets so as to secure the crib for the winter, they were unable to remove all of the crushed stone from the unconcreted pockets. The result was that in concreting the remaining 15 outer pockets in 1935 there was not placed therein the full amount of concrete yardage which otherwise would have been re-

quired and done by plaintiffs, and the contracting officer, whose attention was called to the matter, instructed defendant's inspector to keep an accurate record of the concrete yardage required in the circumstances to fill these 15 pockets. By measurements taken at the time, the contracting officer determined that an amount of concrete 220.66 cubic yards less than the amount which would otherwise have been required to fill these pockets was used and placed therein in 1935, and accordingly in making payment to the plaintiffs for this work he computed the amount of $5,491.35 as the amount which should be deducted from the total contract price because of this reduction in the amount of concrete required. The contract was a lump-sum contract. In making progress payments the contracting officer withheld the amount of $5,491.35, representing the amount of concrete calculated as not having been used in the pockets. Plaintiffs performed this work in May or June 1935. September 14, 1936, they presented to the contracting officer their claim for payment of the amount withheld, and the claim was at that time denied. Later, on October 14, 1936, they again presented their claim for this amount to the contracting officer and, upon consideration thereof and the facts submitted, he allowed the claim for $1,104.57 and denied it for $4,386.79. Plaintiffs appealed and included in their claim to the Secretary of Commerce the entire amount originally withheld by the contracting officer. The Secretary of Commerce, upon findings made, approved the decision of the contracting officer that plaintiffs were entitled to at least $1,104.57, and found and decided further that, since this was a lump-sum contract and in view of the circumstances which caused a lesser amount of concrete to be placed in certain of the outer pockets of the crib in 1935 than would otherwise have been necessary had not some of the concrete placed in certain of the pockets in 1934 found its way into other pockets, plaintiffs were entitled to be paid the full amount of $5,491.35 originally withheld. Inasmuch as the contract work had been completed and accepted September 2, 1936, and final payment of the amount considered to be due under the contract had been made by the contracting officer, the findings and decision of the Secretary of Commerce that plain-

tiffs were entitled to and should be paid this amount were sent to the Comptroller General June 25, 1937, for direct settlement, but, due to the fact that plaintiffs had already instituted suit in May, payment of the amount was not made.

24. *Liquidated Damages, $10,858.75, remission of which is claimed herein.*—The contract time for completion expired October 27, 1934. Plaintiffs did not complete the work until September 2, 1936, 751 days, or 2 years and 20 days, after August 13, 1934, the date on which the contract time commenced to run, and 676 days after the expiration of the original contract period of 75 days. Under the formula prescribed in paragraph 3, page 2 of Schedule A, the amount of liquidated damages for each day of delay for which the plaintiffs were not excusable was about $111.59, and the maximum amount of liquidated damages deductible for delay under the contract was 10 percent of the value of the contract, or $10,858.75. The maximum number of days of delay for which the plaintiffs might be responsible necessary to the accrual of the maximum amount of liquidated damages deductible by the defendant was approximately 97 days. The contracting officer and the head of the department concerned made findings of fact and decided that under the contract and on the facts which were found to have obtained from the date of notice to proceed until the completion of the contract, plaintiffs were excusable for 419 of the 676 days of delay beyond the contract period in completing the work, and that plaintiffs were responsible for 257 days of the total 676 days of delay, as follows:

Days of delay		676
Days excluded under time clause, par. 3, p. 2, specifications from November 1–May 1, 1935	181	
Defendant extended time spring 1935 to June 1, account of weather conditions, but plaintiffs commenced work May 15, and allowed this difference of days	14	
Days excusable for period of November 1, 1935, to May 1, 1936, under time clause	186	
Days excused for unusual weather, 1935	38	
Total		419
Net days of delay		257

The contracting officer and the head of the department found and decided that because of lack of proper progress by plaintiffs, due mainly to unsuitable and inadequate floating equipment, plaintiffs were not ready for the erection of the structural steel during the working season of 1934 because they had not completed the work on the crib as contemplated and called for by the contract, and that the failure of the defendant to deliver the steel when requested by plaintiffs on September 6, 1934, due to a strike in the steel mill, which was beyond the control of either the defendant or the plaintiffs, had not delayed plaintiffs in the proper prosecution of the work called for by the contract; that even if the steel had been available on September 6, 1934, plaintiffs would not have been able to avoid the delay which they experienced in completing the work, and that should a proper period of time be excluded between the date the steel was requested and the end of the 1934 working season as specified in the contract, plaintiffs would not be entitled to the remission of any liquidated damages under the contract, for the reason that subsequent delays by plaintiffs were greater than the number of days required for the accrual of the maximum amount of liquidated damages.

The facts found by the contracting officer and the head of the department in their decisions as to the number of days of delay for which plaintiffs were excusable and the number of days of delay for which they were responsible were not arbitrary or so grossly erroneous as to imply bad faith. Plaintiffs were not prevented by any action of the defendant from carrying on the contract work in orderly sequence according to the provisions and intent of the contract and specifications. The floating equipment owned by plaintiffs or as used by them on the work was unsuitable and inadequate for properly carrying on the work as called for by the contract at the rate of progress contemplated and in the time fixed thereby for completion.

25. The claim of plaintiffs amounting to $49,329.44 made in this suit is, for convenience, tabulated below:

Contract price for the work		$108,587.50
Amount paid plaintiffs thereon		92,237.40
Amount unpaid		16,350.10
The sum of $16,350.10 is made up of two items:		
1. Liquidated damages retained	$10,858.75	
2. Retained by defendant on account of a controversy as to amount of tremie concrete poured into certain pockets	5,491.35	
The balance of plaintiffs' claim is made up of the following items:		
3. Charter of the boat *Dahlke* which plaintiffs contend was, in the circumstances, a useless expense		19,455.95
4. Reconditioning of the crib in 1935		10,346.88
5. Cutting the crib to datum level		1,470.00
6. Purchasing and placing on the crib, in 1934, certain crushed stone and large rip rap		1,311.51
7. Certain welding, strengthening, and straightening of steel		395.00
		49,329.44

The court decided:

1. That plaintiffs were not entitled to recover any amounts under items 1, 3, 4, 5, and 7.

2. That as to the amount of $221.99 for certain crushed stone, included in item 6, as set forth in finding 17, plaintiffs were not entitled to recover.

3. That as to the amount claimed in item 2, $5,491.35, and the remainder of the amount claimed in item 6, $1,089.52, plaintiffs were entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In the petition by which this suit was brought plaintiffs pray judgment against the defendant for $69,967.46. Their revised claim now pressed is for $49,329.44 made up of the items classified and tabulated in finding 25. Of the total amount sought to be recovered the sum of $41,056.58 (items 1, 3, 4, and 7), represents the amount which plaintiffs seek to recover because of alleged delay resulting in alleged unnecessary costs and expenses caused by the alleged failure of defendant to furnish and deliver to plaintiffs certain structural steel when requested on September 6, 1934. This amount is made up of liquidated damages of $10,858.75 de-

ducted from the amount otherwise due under the contract for delay by reason of plaintiffs' failure to complete the contract within the time agreed upon; $19,455.95, alleged unnecessary expense for charter hire and operating costs of a barge; $10,346.88, alleged unnecessary expense in 1935 of reconditioning the crib which was to constitute the foundation for the lighthouse structure; and $395, cost of repairs to crib. The balance of the claim, in the amount of $8,272.86, is alleged to be due under the contract for work performed thereunder. This portion of the claim is made up of items 2, 5, and 6, listed in finding 25.

With the exception of the last three items of the claim mentioned, the claim is based entirely upon the allegation and contention that the defendant breached the contract by failing to furnish structural steel when requested, thereby causing delay and damages to plaintiffs in the completion of the contract, and that, for these reasons, no amount was deductible under the liquidated damage clauses of the contract and specifications, and that defendant should compensate plaintiffs for damages resulting from alleged unnecessary costs and expenses. From the facts disclosed by the record and upon a proper interpretation of the contract between the parties and the specifications forming a part thereof, we are clearly of opinion that plaintiffs are not entitled to recover any amount on or in connection with the first portion of their claim of $41,056.58 above mentioned. Plaintiffs allege and repeatedly emphasize throughout their testimony, and their requested findings and brief, that their plan of operation was to tow the crib to the site, submerge it by the use of crushed and conveyor stone, then erect the structural steel columns and framework thereon and establish within this structural framework a camp site for their force, and construct platforms therein for their materials and concreting equipment for filling the 24 outer pockets around the perimeter of the crib with concrete by the tremie process; that the inability of the defendant, because of the strike, to deliver the structural steel when requested on September 6, 1934, disrupted their plan of operation, causing it to be abandoned, and that, as an alleged direct result, they were delayed in the prosecution of the work and relieved of liability for liqui-

dated damages under the contract and were otherwise damaged in the total amount of $41,056.58 as hereinabove mentioned.

While plaintiffs may have intended to pursue this plan of operation, we are of opinion, first, that the contract and specifications agreed upon and entered into by the parties did not contemplate or provide that the work be carried on in this manner so as to relieve plaintiffs of liability for liquidated damages for delay or to entitle them otherwise to recover, as damages, costs and expenses necessary to be incurred in performing the work called for by the contract; second, that the contract and specifications contemplated and provided that when the crib had been submerged by the weight of the crushed and conveyor stone to be used for that purpose the 25 central pockets of the crib would be filled with crushed stone and the 24 outer pockets would be filled with concrete before installation and erection of the structural grillages, columns, and framework; third, that the contract and specifications did not specify or contemplate that the defendant would deliver the structural steel on any date prior to the complete sinking of the crib in the manner last above mentioned, and the fact that plaintiffs' contemplated plan of operation may have been temporarily disrupted did not, in view of the contract provisions and the facts and circumstances disclosed by the record, relieve plaintiffs of the liquidated damages deducted for delay in completing the contract or render the defendant liable for any portion of the expenses incurred, and necessary to be incurred by plaintiffs, and sought to be recovered. If plaintiffs suffered any delay and expense because of the steel, the cause for nondelivery was beyond the control and without the fault of defendant. In any event the defendant had a reasonable time after the steel was requested within which to deliver it at the designated point which, if plaintiffs had been entitled under the contract to demand the steel at the time they did, would have been not earlier than September 15, and if the period from that date to November 1 were excluded plaintiffs would nevertheless be liable for the full amount of liquidated damages charged and deducted. The steel was delivered early in December 1934. Fourth,

that the contract provided that no work would be required thereunder and plaintiffs would not be charged with time during the period November 1, 1934, to May 1, 1935, and the evidence fails to show that if plaintiffs had received the structural steel on September 5 or 15, any of the delay of which they complained would have been avoided or that they could have erected the steel with the equipment they had, under the weather conditions obtaining, and filled the 24 outer pockets with concrete in accordance with their contemplated plan of operation without incurring the expense of which they complain, and which they seek to recover as damages; fifth, that plaintiffs' troubles and difficulties were more directly attributable to the fact that plaintiffs were inexperienced in lighthouse construction work at such an exposed location as was the structure to be built under the contract in suit, that they started out and continued an attempt to carry on the work called for by the contract with inadequate and insufficient equipment and that, after they had received from the contracting officer on August 8, 1934, notice to proceed and speedily prosecute and carry on the work, they lost about 23 days of the most favorable and valuable time of the contract period of 75 days within which they agreed to complete the entire work at the site of the lighthouse structure as called for by the contract. Sixth, that when plaintiffs requested of the supervising engineer, who was the authorized representative of the contracting officer near the site of the work, that they be furnished the structural steel, the contracting officer did not at that time or at any other time agree that the United States was obligated under the contract to furnish the steel at that time, although the contracting officer and his representative were at all times anxious and willing to do everything they could to aid plaintiffs in advancing the work and completing the same within the shortest practicable time. Accordingly, when it was found that due to a strike which probably would not be settled in time for delivery of the structural steel during the period up to November 1, 1934, in which the contract contemplated that the work would be carried on (the contract time for the performance of the whole work as agreed upon expired on

October 27, 1934), the defendant's supervising engineer offered, without expense to plaintiffs, to furnish and deliver to them on the crib sufficient wooden 12″ x 12″ and 2″ x 12″ timbers to be used for erection on the crib by plaintiffs of a temporary framework as a substitute for the structural steel framework, in order that plaintiffs might be able to proceed in accordance with their plan of operation. This arrangement was agreed to and approved by plaintiffs by Herman Greiling, the principal member of the partnership. In addition to the timber mentioned, the defendant agreed to furnish and deliver the necessary bolts, etc., for its erection on the crib. The defendant did supply and deliver to the crib, with its own ship, the timbers, bolts, etc., and a part of it was unloaded on the crib on September 12. All the material was not then unloaded at the request of plaintiffs. The balance of the timber was made available to plaintiffs when needed. No more of the timber was delivered by defendant because the plaintiffs, by reason of weather conditions, abandoned the arrangement to erect the timber framework and platform for the purpose of continuing with their desired plan of establishing a camp site in the upper portion thereof and placing within the structure their material and concrete equipment for the purpose of filling the outer pockets of the crib with concrete by the tremie process before closing down work until the following spring. It was perfectly obvious long before the plaintiffs requested delivery of the steel that they would not be able, because of delay, and with the equipment they had, to complete within the working season of 1934 any substantial portion of the work called for before the expiration date of the contract period. Seventh, that the contracting officer under the terms and provisions of the contract could have decided at the time plaintiffs requested the steel that the structural steel framework should not be constructed until the outer pockets of the crib had been filled with concrete and that plaintiffs should first proceed to perform that portion of the work. Plaintiffs were not then, nor subsequently, able with the equipment which they had on hand to complete the filling of the outer pockets of the cribs with concrete during the available working

time. When plaintiffs made claim to the contracting officer for remission of liquidated damages and alleged unnecessary expense incurred by reason of the alleged failure to furnish the steel, the contracting officer and the head of the department, in deciding the dispute, held that plaintiffs were not actually delayed in the proper prosecution of the work by failure to receive the structural steel when requested, and that the contract and specifications contemplated and provided that the 24 outer pockets of the crib should be filled with concrete before the structural steel was erected. These decisions were correct. Eighth, that in any event plaintiffs would be liable for the full amount of the liquidated damages deducted and retained by the defendant for delay in completing the contract for the reason that the work called for was not completed until 676 days beyond the period agreed upon and 257 days after the allowance of all excusable delays to which plaintiffs were entitled. Under the terms of the contract and specifications only about 97 days of inexcusable delay by plaintiffs would have required the deduction and retention of the full amount of liquidated damages which were deducted and retained under the contract. Ninth, the structural steel was delivered by the defendant at plaintiffs' base of operations in December 1934, and when plaintiffs resumed operations on May 15, 1935, they did not use and erect the structural steel for the purpose of providing a camp site and working platforms on the crib, for the purpose of filling with concrete the remaining fifteen unfilled outer pockets of the crib, as they insist they had contemplated and planned, but this work was performed by placing the concrete equipment and materials on the center portion of the crib. There was no reason why this method could not have been more easily and effectively employed in 1934. The erection of the structural steel was commenced June 15, 1935, and was completed early in August. Tenth, that after final completion of the work September 2, 1936, the contracting officer and the head of the department granted plaintiffs a hearing upon their claims for remission of liquidated damages and reimbursement for alleged unnecessary expense due to failure of the defendant to deliver the structural steel when re-

quested, and, from the facts disclosed and found and upon the provisions of the contract and specifications, the contracting officer and the head of the department decided that plaintiffs were not entitled to payment on any items of this portion of their claim, or any portion thereof. Their decisions were not only not arbitrary or so grossly erroneous as to imply bad faith, but in our opinion they were correct.

The foundation of the lighthouse structure called for by the contract consisted of a large pier 64 ft. square and 27 ft. deep, consisting of 27 courses of 12″ x 12″ timbers as a frame being divided by similar timbers into 49 pockets, 24 of which were disposed around the outside edges of the crib and 25 within the center area thereof. The crib itself was constructed by the defendant and was designed to float at such depth, with the steel ice plating at the water line and at the outside of the crib, in position so that it could be towed directly to the prepared site for the lighthouse structure, and the specifications required that the crib be sunk to the ground at the bottom of the lake on the site by placing certain crushed stone in the 25 central pockets and certain large stones on top of the crib. The specifications provided that immediately following the sinking of the crib in this manner and the placing of some small crushed stone in the bottom of the outside pockets for the purpose of leveling the crib, the 25 central pockets should be completely filled with crushed stone and the 24 outer pockets should immediately be filled with concrete placed by the tremie process. Upon so filling these outer pockets, steel grillages were to be placed to support the steel columns and framing of the superstructure and a slab of reinforced concrete 6 feet thick placed over the entire area of the crib after the steel grillages, columns, and framework had been erected. The pier foundation was to be protected by rip rap stone placed outside of the crib on all sides, this protection being provided for under a separate contract. This general type of pier construction had become more or less standard on the Great Lakes, having been used at more than seven sites. On top of the reinforced 6-foot concrete slab was to be constructed the pier

proper, of concrete and steel 21′6½″ above the top of the crib, and on top of this the fog signal building of steel and masonry. The entire structure from the top of the crib foundation is illustrated and shown on drawing 34030–1 and the crib details are shown on drawing 34030–5. The 25 central pockets of the crib were provided at the bottom of the crib with a 6″ x 12″ plank grillage. All the pockets of the crib were 27 feet deep. The 24 outer pockets of the crib, with the exception of the four corner pockets, were 5′ 6″ by, approximately, 8′, and the four corner pockets were 5′ 6″ square. The specifications, on which plaintiffs contend they base their contemplated plan of operation, were prepared in considerable detail and in arrangement and language from beginning to end indicate and show the sequence of operations intended to be carried on in the performance and construction of the work called for. The specifications first designated the site and the depth of the water thereat and then listed the drawings for the entire structure. Then followed the provision as follows:

> As stated in the Schedule, page 2, paragraph H, it is desired that the work covered by this General Construction Contract shall be completed within 75 calendar days, or sooner if practicable. Bidder state on Schedule at place indicated, TIME, CALENDAR Days, required for completion after order to proceed.
>
> NOTE.—In case the construction period should extend past November 1, 1934, the winter period November 1, 1934, to April 30, 1935, shall be exempt in computing calendar days required by contractor to complete the work.

Before plaintiffs submitted their bid on August 2, 1934, this quoted provision, together with certain other provisions of the specifications not material here, was amended, and the plaintiffs were furnished with the changed and amended provision on July 27, 1934, as follows:

> The specifications are hereby changed as follows:
> Referring to Specifications, Common Clauses, Page 2, Paragraph 3, as stated, it will be very desirable that the work at each station shall be completed within 75 calendar days, and in case weather conditions prove favorable, it is believed that contractors will be able to accomplish substantial completion of the main body of the work within that time, or in any event, not over

> 90 days, with distinct advantage to their own interests, avoiding the possibility that the work would have to be suspended over the winter period (time exempt November 1st, 1934, to April 30, 1935) and resumed in the Spring.
>
> However, to avoid the possibility that *seventy-five days* may prove to be an unreasonable requirement in case weather, wind, and sea conditions should prove unfavorable, the time requirement is hereby changed from 75 days to 120 days, with the exempt period same as stated Page 2, Paragraph 3 "NOTE" November 1, 1934, to April 30, 1935.
>
> In comparing bids for award of contract, the requirements of Schedules, Page 2, Paragraph I will be followed in considering the time for completion offered by the several bidders.
>
> The structure shall be completed up to top of the main six-foot concrete slab and all of the riprap shall be placed in any event, before suspending work for the winter, in case such suspension should prove necessary.

The plaintiffs in their bid of August 2, 1934, signed by Herman Greiling, on Schedule A, page 4, offered and agreed to furnish all material and labor and construct Grays Reef Light Station, all as shown by the plans and described by the specifications, for the sum of $108,587.50 and to complete the same within "75 calendar days after order to proceed." In making their bid, plaintiffs accepted and agreed to the terms and conditions of the proposed contract and the specifications submitted and agreed to execute a written contract embodying the same. C. H. Hubbard, Superintendent of the 12th District Lighthouse Service, Department of Commerce, was the contracting officer acting for and on behalf of the defendant and neither the award of the contract nor the agreement entered into by the plaintiffs was required to be approved by any other official in order to become binding. Plaintiffs' bid, although not the lowest in amount of money, was the lowest on the basis of evaluation provided in the proposal and Schedule A because of the fact that plaintiffs agreed to complete the work within 75 calendar days whereas the only other bidder offered to complete the work in 120 calendar days. Schedule A of the proposal provided that for the purpose of com-

parison of bids the time for completion offered by bidders would be evaluated at the same rate as stated in the specifications under the paragraph relating to liquidated damages, and the liquidated damage provision specified about $111.59 a day for delay.

The specifications then proceed in paragraph 4, entitled "Camp Facilities," to state as follows:

> Especially in connection with the Grays Reef work, because of its very remote and inaccessible location, it appears that it will be necessary for contractor to provide a camp for quartering and caring for working force. It would appear that the use of floating plant which can be kept "on the job" nearly continuously, suitable for the provision of quarters would be necessary.
>
> In case contractor desires he may use the old steel building and tower at the old abandoned Waugoshance Lighthouse, located about 4 miles northeasterly. It would be quite practicable to establish a camp right at the site in the upper story of the steel building, soon after the sinking of the crib and the erection of the steel.

It will be noted from the above that the specifications are speaking only with reference to quarters for the working force and warns the bidder to whom a contract may be awarded for the Grays Reef Lighthouse that because of the very remote and inaccessible location of the work it would be necessary for the contractor to provide a camp for quartering and caring for his working force and that the use of a floating plant which could be kept on the job nearly continuously and suitable for provision of quarters would be necessary. The bidder and prospective contractor was then advised that if he should become the contractor he might use the steel building and tower of an abandoned lighthouse about four miles from the site of the work to be performed. It is suggested with reference to a camp site only that it would be practicable to establish a camp right at the site in the upper story of the steel building soon after the sinking of the crib and the erection of the steel.

There is clearly nothing in the language of this paragraph of the specifications that suggested the erection of steel be-

fore the pouring of 24 outer pockets, nor any language which obligated the defendant to furnish the structural steel at any particular stage of the work, or any language that would entitle plaintiffs to bind the defendant by any plan of operation not strictly in accordance with other provisions of the specifications. The words "soon after the sinking of the crib," in the second paragraph above quoted, if it could be held that they constituted anything other than a mere suggestion to the contractor, must be interpreted in the light of other and later provisions of the specifications relating to the complete sinking of the crib by filling all pockets and erecting a steel superstructure thereon.

The next paragraph, 5 of the specifications, related to the establishment of a light and fog signal at the site in the event of removal of the neighboring Light Ship. Paragraph 6, entitled "Timber Crib," referred to certain subsequent special clauses relating to Grays Reef Lighthouse and proceeded to describe and specify the details of the timber crib. Paragraph 7 also related to the crib and was entitled "SECURING BOTTOM FORM TIMBER TO UPPER PART OF STEEL PLATE" as shown on sheet 7 of the drawings. This had nothing to do with the structural steel. Paragraph 8 related to "RIP RAP STONE ABOUT CRIB"; paragraph 9 related to "SMALL RIP RAP STONE"; paragraph 10 related to "LARGE RIP RAP STONE"; paragraph 11 was as follows:

> "STONE FOR FILLING 25 CENTER POCKETS OF CRIB."
>
> Shall be 7" "furnace" or "conveyor" stone (hard limestone or other stone of similar characteristics), or "one man" size stone. The filling stone shall carry a mixture of crushed stone, quarry spalls, or gravel in approximate graded sizes sufficient to reduce the voids to about 20% and insure the filling of the pockets compactly and give the crib maximum weight.

(See paragraph 16—"Sinking crib and filling with stone.")

Paragraph 12 related to "CRUSHED STONE OR GRAVEL FOR SEALING THE BOTTOM OF CRIB"; paragraph 13 related to "GRAVEL FILL FOR BASEMENT," and paragraph 14, entitled "TOWING CRIB TO SITE AND ANCHORING," provided as follows:

> Contractor shall provide ample towing power in tug or tugs employed to tow the fabricated crib to site and

shall provide an ample number of heavy anchors with mooring lines or cables stored on convenient platforms above top of steel protection plate or otherwise arranged for convenient use in case of emergency, so that by no possibility shall the crib be lost or damaged in case of sudden storm or other emergency.

Sinking of crib shall not be attempted unless there is actually on hand, ready to use, the full amount of stone to fill the 25 central pockets.

Plaintiffs complied with this paragraph but they did not tow the crib to the site until September 1, 1934, 18 days after they had been given notice and ordered to proceed. Paragraph 15 entitled "LEVELING BOTTOM FOR CRIB", set forth in finding 8, contained directions for submerging the crib in such manner as to bring the crib in contact with the bottom of the lake with the top of the crib at the desired level.

The next two paragraphs, 16 and 17, of the specifications are important in connection with the items of the claim of plaintiffs now under consideration. They relate to the sinking of the crib. Paragraph 16 entitled "SINKING CRIB AND FILLING WITH STONE" is set forth in finding 8, and paragraph 17 is as follows:

FILLING 24 OUTER POCKETS OF CRIB WITH CONCRETE THRU TREMIE.—(Approximately 1,485 cu. yds. tremie concrete, more or less, for Grays Reef.)

Immediately following the sinking of the crib by the filling of the 25 inner pockets with stone, the 24 outer pockets of crib shall be filled with concrete, placed in the water-filled pockets thru a tremie pipe.

Before the placing of the concrete under water is started, each pocket shall be inspected by diver to make certain that the pockets are tight against leakage of concrete. To insure such tight condition, deposit gravel or crushed stone in each pocket in sufficient minimum amount as will insure such tightness and also deposit gravel or crushed stone about outside of crib wall and bank up against wall, if necessary, to make certain that concrete is retained in pockets. See paragraph No. 16.

It is suggested that the bottom of each pocket then be sealed with about 3 cu. yds. of concrete placed by bottom dumping bucket having blanketed top, lowered to bottom and dumped in each pocket. The pockets then to be filled approximately as described below.

> Each pair of pockets then to be filled with concrete, poured through a pipe tremie of proper size appropriate to the size of mixer. In starting the pouring operation through tremie, proper precautions shall be exercised to prevent the washing of the initial charge and once started tremie shall be kept continuously full and lower end well bedded into concrete fill to insure the slow and continuous filling with concrete under pressure and without serious washing out of cement.
>
> It is believed that each group of 3 pockets can be filled through a single tremie pipe by keeping the tremie in the center pocket.
>
> Care shall be exercised that the filling operation shall not be so fast as to produce dangerous pressures on walls of crib. In case mixer is of such large size as to make filling too rapid, then two or more tremies shall be used working with additional pairs of pockets. The concrete poured thru the tremie shall be mixed to such consistency as will insure the best concrete in place under water, should be not quite moist enough to be plastic. If mixed too wet this charge is likely to be lost—if too dry the chute will be choked.
>
> On completion of concreting of a group of 3 pockets, the steel reinforcing dowels shown on plans shall be inserted in top when the concrete has hardened sufficiently to sustain the weight of dowels at proper height.

We think it is obvious from the language of these specifications that the crib was not to be regarded as completely sunk for the purpose of erecting thereon the structural steel framework until all the pockets of the crib had been filled with crushed stone and concrete as specified. Moreover, paragraph 17 clearly and specifically provided that "*immediately following the sinking of the crib*" by the filling of the 25 inner pockets with crushed stone, the 24 outer pockets of the crib should be filled with concrete. We think, therefore, there is no justification for plaintiffs' contention that the specifications provided and authorized them to adopt and insist upon a plan of operations for the erection of structural steel immediately upon sinking the crib and filling the 25 inner pockets with crushed stone before they had placed any concrete in the 24 outer pockets of the crib. This conclusion is further supported by reference to subsequent provisions of the specifications having to do

with the construction of the superstructure upon the crib pier foundation. Plaintiffs' contention is, in effect, that they had a right under the specifications to insist upon a plan of operation which would permit them to erect a part of the superstructure before they had completed the foundation. The greater weight of the evidence of record is that while this method of operation might be possible it was impractical and was not the usual, customary, and most practical way of carrying on the work of constructing lighthouse structures of this character.

The next paragraphs, 18 to 24, inclusive, of the specifications related to concrete materials, and paragraphs 25 and 26, upon which plaintiffs mainly rely in support of their claim for $41,056.58 made up of the items now under consideration, are quoted in finding 11:

The top of the crib as filled with crushed stone and concrete was datum 578.5. On top of this was to be constructed a 6′ thick concrete "main slab"; 3′ 7¼″ above the top of this main slab in the steel framework came the "storage room floor" which was 9′ 7¼″ above the top of the crib; above this 7′ ¼″ was the "machinery room floor" which was 16′ 10½″ above the top of the crib. 10′ above this point came the "main deck," concrete slab 4″ thick. The main deck, mentioned in paragraph 25 was 21′ 6½″ above the top of the crib. At the main deck the drawings show a set-back of about 16′ and then the tower of the lighthouse structure begins, and 5′ 10½″ above the main deck floor is the floor of the living-room quarters for the lighthouse keeper, which is 26′ 10½″ above the crib. From this it will be seen while paragraph 26 of the specifications indicated that plaintiffs might construct a temporary camp at a certain elevation, and paragraph 25, *supra*, indicated plaintiffs might place their concreting plant in the upper portions of the steel framework, there is nothing in paragraph 25 or 26 which will support the conclusion that these paragraphs contemplated that plaintiffs should or might erect the structural steel framework before completely filling the 24 outer pockets of the crib with concrete before erecting in the upper stories of the steel framework their concreting plant

and platforms for the storing of materials for the purpose of filling the 24 outer pockets of the crib with concrete. If plaintiffs in making their bid planned to carry on the work of constructing the lighthouse in the manner in which they contend, they were not supported or justified therein by any provision of the specifications. Accordingly, plaintiffs are not entitled to hold the defendant responsible for damages by reason of the inability of the defendant, because of the strike at the steel plant, to deliver to plaintiffs the structural steel at the time they requested it on September 6, 1934.

The facts set forth in the findings show that when plaintiffs resumed operations May 15, 1935, they did not proceed in accordance with their alleged original plan but mixed and placed the concrete necessary to fill the outer pockets of the crib with concreting equipment and materials placed over the central area of the crib which had been filled with crushed stone. The pockets in this area had been so filled at the time they requested the defendant to deliver the structural steel September 6, 1934. Plaintiffs did, as we think the specifications contemplated and provided, place their concreting equipment and material in the upper portions of the structural steel framework erected after the outer pockets were poured for the purpose of pouring the additional concrete called for by the contract. Although the steel was available when plaintiffs resumed operations May 15, 1935, its erection was not commenced until about June 15 and was not completed until early in August.

The facts further establish that the contracting officer and the head of the Department considered plaintiffs' claims for remission of the amount deducted and withheld for the delay and the alleged unnecessary costs and expenses not contemplated by the contract, and made findings of fact and denied the claims making up the amount of $41,056.58 now under consideration and also item 5, finding 25, for $1,470 (see finding 22). The record fails to show that these findings and decisions were arbitrary or so grossly erroneous as to imply bad faith. Under articles 9 and 15 of the contract these decisions were therefore final and conclusive.

Accordingly, plaintiffs are not entitled to recover any amount under items 1, 3, 4, 5, and 7 of their claim as set forth in finding 25.

The remaining amount of the claim, items 2 and 6, finding 25, is \$6,802.86. Included in item 6, totaling \$1,311.51, is the amount of \$221.99 for certain crushed stone washed out of the crib during the winter of 1934, as set forth in finding 17. Plaintiffs concede that if they are entitled to recover on this claim, the amount of \$221.99 is correct. We are of opinion, however, that plaintiffs are not entitled to recover on this item for the reason as hereinbefore stated, and as found by the Secretary of Commerce, that the responsibility of protecting the crib for the winter months was that of the contractor and that the Government was not required under the facts and contract provisions to reimburse plaintiffs for the cost of any crushed stone that may have been washed out of the crib between the time they ceased operations in November 1934 and commenced operations in May 1935.

With reference to the remainder of the claim amounting to \$6,580.87, being the entire amount of item 2, and \$1,089.52 of item 6, finding 25, the record shows, and we have found as a fact, that in the findings and decision of the Secretary of Commerce on appeal, the amounts of these items of the claim were allowed, but that inasmuch as the work called for by the contract had theretofore been completed on September 2, 1936, and the final payment for the amounts then considered to be due had then been made by the contracting officer, the findings and decision on appeal were sent to the Comptroller General June 25, 1937, for direct settlement. Inasmuch, however, as plaintiffs had theretofore on May 5, 1937, instituted suit in this court, no payment was made.

Plaintiffs are therefore entitled to recover \$6,580.87 and judgment in their favor will accordingly be entered. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

ARROW DAIRY COMPANY, INC. v. THE UNITED STATES

[No. 43836. Decided April 7, 1941]

On the Proofs

Manufacturer's tax on butter.—Where the Commissioner of Internal Revenue assessed against plaintiff a tax as a manufacturer of adulterated butter and where the plaintiff denies that it manufactured butter, adulterated or otherwise; it is *held* that the proof sustains the allegation that plaintiff did manufacture adulterated butter and the estimate by the Commissioner of the amount so manufactured is assumed to be correct in the absence of any proof to the contrary.

The Reporter's statement of the case:

Mr. H. G. Robertson for the plaintiff.

Mr. D. F. Hickey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Arrow Dairy Company, Inc., plaintiff, is a corporation organized under the laws of the State of New York with its principal place of business at 118 Hudson Street, New York, N. Y. Its principal business was dealing wholesale in butter, cheese, cream and eggs.

2. On March 27, 1937, the Collector of Internal Revenue for the Second District of New York served upon plaintiff a notice and demand for $948.50 total tax assessed as follows: Commodity tax of 10 cents per pound on 5,460 pounds of adulterated butter, amounting to $546.00; a manufacturer's special tax for the seven months' period beginning December 1, 1936, on the basis of $600.00 per year ending June 30, 1937, amounting to $350.00, and a penalty of 5 per cent per month for failure for three months to file a special tax return, amounting to $52.50.

3. Plaintiff, on April 7, 1937, filed its claim in abatement for the $948.50 total tax paid, on the ground that it was not a manufacturer, and had never had on its premises 5,460 pounds of butter which it had itself manufactured. On September

13, 1937, its claim for abatement was rejected. On October 21, 1937, it paid to the Collector of Internal Revenue $100.00 of the tax so assessed. On November 13, 1937, a claim was filed by it for refund of this $100.00, and a claim for abatement of $848.50. Under date of January 12, 1938, these claims were rejected by the Bureau of Internal Revenue on the ground that samples of the product manufactured by plaintiff, and sold to various retail dealers, contained an excessive amount of moisture, as disclosed by analysis. On November 29, 1937, plaintiff paid an additional $100.00 of the tax so assessed. No claim for refund of this $100.00 has been filed. On February 10, 1938, plaintiff filed this suit, to recover the sum of $200.00, and the allowance of the claim in abatement in the sum of $748.50.

4. On three occasions in 1936 inspectors of the Bureau of Food and Drugs of the City of New York discovered in the stores of Joe Mazin and Harry Wien adulterated butter which had been bought from plaintiff. The water content of this butter ran from 25.54 per cent to 30.85 per cent.

Following this, and on December 16, 1936, the inspectors took three samples of butter in three cans in the ice-box on the first floor of plaintiff's establishment. The fat content ran from 71.03 per cent to 76.43 per cent, and the moisture content from 22.83 per cent to 28.41 per cent.

This butter, totalling 150 pounds, had been churned from sour cream the night before by one of plaintiff's employees.

For this plaintiff was charged by the City of New York with manufacturing butter without a permit and with possessing adulterated butter. It pleaded guilty.

5. The plaintiff from December 1, 1936 to December 16, 1936 manufactured 5,460 pounds of butter, which was adulterated in that there was added to it an excess quantity of water.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court.

This case presents only an issue of fact. The Commissioner of Internal Revenue assessed against plaintiff a tax as a manufacturer of adulterated butter. The plaintiff says

it manufactured no butter, adulterated or otherwise. This is the issue in the case. The proof is abundant that some of the butter sold by plaintiff was adulterated. If it manufactured any butter at all, it manufactured adulterated butter. The Commissioner of Internal Revenue estimated the amount manufactured by plaintiff from all the available evidence. The plaintiff did not introduce proof to show this estimate was too high because it says it did not manufacture any at all. Therefore, if we find plaintiff manufactured any butter, we must assume that the Commissioner has stated the correct amount.

A commissioner of this court has found that the plaintiff did manufacture butter. We have carefully examined the testimony and agree with the commissioner, notwithstanding the unequivocal statements to the contrary of three or four of plaintiff's officers and employees.

On December 16, 1936, an inspector of the Sanitary Department of the City of New York took samples of butter from a number of different cans in plaintiff's ice box where it stored articles it had on hand for sale. On analysis it proved to be adulterated, on account of its excessive water content. The plaintiff undertakes to explain its presence in its ice box by saying that one of its employees after hours the night before had churned into butter some sour cream that he had been ordered to destroy, and had put the resultant butter into the ice box without authority and without the knowledge of the management. There are a number of things that make it impossible to believe these statements.

In the first place, plaintiff had on an upper floor a mixer peculiarly adapted to churning sour cream into butter, and on this floor were quite a number of cans such as the ones in which plaintiff put this butter, and in which it put similar butter sold to its customers.

Second. It seems unreasonable that the manager of the plant would have ordered six or seven hundred pounds of sour cream to be destroyed, since the proof shows that 75 percent of all the butter made in the country is made from such cream.

Third. It seems doubtful that plaintiff's employee would have churned this 150 pounds of butter and put it in the ice

box for sale unless he had been instructed, or at least authorized, so to do.

Fourth. Plaintiff regularly sold similar butter to its customers.

Fifth. Plaintiff's president denied to the Acting Director of the Bureau of Food and Drugs of the City of New York that plaintiff had been whipping butter since September, but admitted it had been whipping it since the end of November or December. He made substantially this same admission to the Internal Revenue Agent.

Sixth. Plaintiff's treasurer admitted to an Internal Revenue Agent who interrogated him that plaintiff rechurned or whipped butter, and pointed out to him the machine used for this purpose. This man estimated they made 300 or probably 340 or 350 or 360 pounds of it a day.

Lastly. When on account of the churning of this sour cream plaintiff was charged by the City of New York with whipping butter without a permit and with possession of adulterated butter, it pleaded guilty.

In the face of all this, it is too great a tax on one's credulity to give credit to the statements of plaintiff's witnesses. Plaintiff's petition must, therefore, be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and LITTLETON, *Judge,* concur.

WHALEY, *Chief Justice,* concurring:

This case involves simply one issue of fact.

The Commissioner of Internal Revenue assessed the plaintiff a tax as a manufacturer of butter. The contention is made by the plaintiff that no butter was manufactured by it during the months for which the assessment was imposed. The preponderance of the evidence establishes that the plaintiff manufactured butter during the period for which the tax was assessed.

The manufacture of butter by the plaintiff subjects it to the tax and the Commissioner of Internal Revenue was correct in making the assessment.

I concur in the dismissal of plaintiff's petition.

W. J. NOLAN v. THE UNITED STATES
No. 43861

L. JACOBSON v. THE UNITED STATES
No. 43862

J. A. HIGUERA v. THE UNITED STATES
No. 43863

CAROLYN HATHAWAY, GUARDIAN OF ESTATE OF C. H. DAMSTED v. THE UNITED STATES
No. 43864

R. GALLEGUILLO v. THE UNITED STATES
No. 43865

F. G. GRIGSBY v. THE UNITED STATES
No. 43866

K. H. JOHNSON v. THE UNITED STATES
No. 43867

R. DUPOUY v. THE UNITED STATES
No. 43868

C. J. DEGEN v. THE UNITED STATES
No. 43869

W. L. NOLAN v. THE UNITED STATES
No. 43870

R. C. JENSEN v. THE UNITED STATES
No. 43871

M. J. RODERICK v. THE UNITED STATES
No. 43872

L. K. MOORE v. THE UNITED STATES
No. 43873

C. LEDERER v. THE UNITED STATES
No. 43874

Syllabus

M. KELLEY v. THE UNITED STATES

No. 43875

R. DINKEL v. THE UNITED STATES

No. 43876

A. J. MOUCHOU v. THE UNITED STATES

No. 43877

C. R. TAYLOR v. THE UNITED STATES

No. 43878

M. KNULL v. THE UNITED STATES

No. 43879

S. W. LIGON v. THE UNITED STATES

No. 43880

C. C. JOHNSON v. THE UNITED STATES

No. 43881

W. P. BRENNAN v. THE UNITED STATES

No. 43882

C. F. SIEBERT v. THE UNITED STATES

No. 43883

J. T. WEEKS v. THE UNITED STATES

No. 43884

[Decided April 7, 1941]

On the Proofs

Pay and allowances; extra labor as firemen at Mare Island Navy Yard contrary to order of Secretary of the Navy.—Under the special jurisdictional act, it is *held* that the intention of Congress in enacting said act was to provide that plaintiffs should be compensated, at their respective rates of pay, for the 8 hours they were severally required to stand by and be on call for the respective number of days involved during the period in question.

The Reporter's statement of the case:

Mr. Robert F. Klepinger for the plaintiffs; *Rhodes, Klepinger & Rhodes* were on the brief; *Messers Fred B. Rhodes, Cooper B. Rhodes* and *Robert F. Klepinger* of counsel.

Mr. John B. Miller, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact, as follows, in the case of W. J. Nolan, No. 43861:

1. This action, one of twenty-four, is brought by virtue of an Act of Congress, approved May 15, 1937, 50 Stat. 964, for the recovery of "loss and damage" to the plaintiff for "extra labor" performed as fireman at the Mare Island Navy Yard, California.

The same relevant circumstances of employment apply to the entire group of plaintiffs, save for the fact that the length of service during the period covered by the Congressional reference differs in individual cases.

Therefore, reference will be made in the findings in the other twenty-three cases to the findings in the instant case, as the facts are identical and applicable.

2. The Act of Congress reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claims of W. J. Nolan, L. Jacobson, J. A. Higuera, C. H. Damsted, R. Galleguillo, F. G. Grigsby, K. H. Johnson, R. Dupouy, C. J. Degen, W. L. Nolan, R. C. Jensen, M. J. Roderick, L. K. Moore, C. Lederer, M. Kelley, R. Dinkel, A. J. Mouchou, C. R. Taylor, M. Knull, S. W. Ligon, C. C. Johnson, W. P. Brennan, C. F. Siebert, and J. T. Weeks, all of Vallejo, California, for extra labor over and above the sixteen-hour period of duty per day required to be performed at Mare Island Navy Yard, California, which extra labor over said period was not in accordance with the order of the Secretary of the Navy, dated December 1, 1920; *Provided*, That the action in the Court of Claims to establish such losses and damages may be instituted within one year from the date of the approval of this Act, without regard to any statute of limitations.

3. The individual claims all date from December 1, 1920, down to and including the 1st day of March 1925.

4. The fire department at Mare Island over the period in question consisted of a corps of men employed in various ratings in the regular Navy Yard forces, and assigned to duty as firemen. W. J. Nolan, the Acting Fire Chief, was employed as a leadingman engineman and the other men on the corps were employed as chauffeurs, laborers, general helpers and cementers. The number of men varied from time to time, being as high as twenty-four in 1920 and never falling below fourteen down to the year 1925.

5. The men were assigned to fire duty on their own applications, and there does not appear to have been any difficulty in securing the authorized quota of firemen.

6. The duties of firemen were primarily to man the apparatus, respond to alarms and extinguish fires; but in addition to such duty, owing to the fact that the Fire Department serviced a Navy Yard of large area, many other duties were necessary. Such other duties consisted of servicing naval vessels with water when such vessels arrived or departed from Mare Island after the regular working hours of the yard; repairing to power lines and breaks in water service and plumbing; replacing lights on street obstructions; driving a truck or light vehicle for use by the officers at Navy Yard shops; wetting the streets in particular areas; and in general acting as an emergency unit for any untoward circumstances. There was no record kept of the number of these varied duties or special calls, the time records of the fire house simply showing that eight hours' regular duty per day from 8:00 A. M. to 5:00 P. M. were put in by the men, but not the special duties performed nor their specific nature or duration. The records do not show during which period of duty such special services were rendered, and the testimony establishes only that such duties were performed during the night, that is, between the hours of 5:00 P. M. of one day and 8:00 A. M. of the next.

7. The firemen were quartered at the fire house and were required to be available twenty-four hours per day duty six days a week. Each man was allowed thirty days annual leave and one day off each week Whenever a man worked on

Sunday he took off some other day during the week. The rate of pay for Sunday work was time and one-half or fifty percent additional to normal pay. On holidays, as distinguished from Sundays, the rate of pay was two and one-half times the regular pay rate.

Sunday pay was allowed each fireman performing duty on that day even though his work week consisted of only six days, including such Sunday.

8. Firemen on duty at Mare Island could not leave the Yard without first obtaining special permission from the Fire Chief. Occasionally such passes were granted, but this was in the nature of a special privilege and applications for them were more frequently refused than granted. Each pass issued by the Fire Chief had to be approved by the Captain of the Yard. The record does not show that any pass issued by Chief Nolan was refused by the Captain of the Yard. As illustrating the hours required of the firemen to be on duty and to stand by for fire calls and other emergency duties, the following schedule is set forth, which, with the exception of annual leave taken at varying intervals throughout the year, is typical of the period from January 1, 1920, to January 1, 1924:

Wednesday, 8 a. m. to 4 p. m.	8 hours.
Wednesday, 4 p. m. to 12 midnight	8 hours.
Thursday, 12 midnight to 8 a. m.	8 hours.
Thursday, 8 a. m. to 4 p. m.	8 hours.
Thursday, 4 p. m. to 12 midnight	8 hours.
Friday, 12 midnight to 8 a. m.	8 hours.
Friday, 8 a. m. to 4 p. m.	8 hours.
Friday, 4 p. m. to 12 midnight	8 hours.
Saturday, 12 midnight to 8 a. m.	8 hours.
Saturday, 8 a. m. to 4 p. m.	8 hours.
Saturday, 4 p. m. to 12 midnight	8 hours.
Sunday, 12 midnight to 8 a. m.	8 hours.
Sunday, 8 a. m. to 4 p. m.	8 hours.
Sunday, 4 p. m. to 12 midnight	8 hours.
Monday, 12 midnight to 8 a. m.	8 hours.
Monday, 8 a. m. to 4 p. m.	8 hours.
Monday, 4 p. m. to 5 p. m.	1 hour.
Total hours	129 on.
Monday, 5 p. m. to 12 midnight	7 hours off.
Tuesday, 12 midnight to 8 a. m.	8 hours off.
Tuesday, 8 a. m. to 4 p. m.	8 hours off.
Tuesday, 4 p. m. to 12 midnight	8 hours off.
Wednesday, 12 midnight to 8 a. m.	8 hours off.
Total hours	39 off.

9. This schedule of hours was changed January 1, 1924, and each fireman was given an additional four hours off on Saturday afternoons, which increased the time off to forty-three hours per week and correspondingly shortened the hours of duty to one hundred and twenty-five.

10. The evidence discloses that the men complained frequently to the Fire Chief about the long hours of continuous duty but no objection was lodged with the Captain of the Yard until January 6, 1925. This complaint was voiced in the following letter:

FIRE DEPARTMENT,
NAVY YARD MARE ISLAND, CALIFORNIA.
January 6, 1925.

From: Members of the Fire Department, Mare Island, California.
Via: Fire Chief, W. J. Nolan.
To: Captain of the Yard.
Subject: Request More Time Off.

1. We, the members of the Fire Department, Mare Island, take the liberty of requesting from our officer, Fire Chief, William J. Nolan, more time off.

2. We do not ask for more time than the Secretary of the Navy has been good enough to allow us, according to the order of Secretary of Navy, dated December 1, 1920.

3. If it be taken into consideration, we then would be required to remain on duty ninety-six hours and seventy-two off duty, in place of one hundred twenty-five hours, and forty-three off duty.

4. This can be arranged with the present number of men that are on duty in the Fire Department.

5. This will also, greatly improve the efficiency, as well as the morale of the Fire Department.

Respectfully,
MEMBERS OF THE FIRE DEPARTMENT,
MARE ISLAND, CALIFORNIA.

11. Following the letter to the Commandant, a schedule or watch list was worked out with a crew of fourteen men including the Chief, which allowed each man eight hours off daily in addition to the one day of leave weekly and the annual leave of thirty days.

12. On December 1, 1920, the Secretary of the Navy issued an order to the Commandant, Navy Yard, Mare Island, California, the relevant paragraphs stating:

The Department authorized the continuance of assignments of men in miscellaneous ratings in the fire-fighting force until new ratings are established for this work. The schedule of hours of service to be as follows:

Eight-hour service per diem for their rate of pay, and in addition require their presence for an additional eight hours' nominal duty, in order to be within call in the event of a fire call, in consideration of being furnished quarters, heat and light, etc. The eight-hour nominal tour of duty should be arranged so that each employee may have a third eight-hour period off duty.

13. The order of December 1, 1920, was received by Fire Chief W. J. Nolan, but he advised the Public Works Officer that more men would be needed to carry out the order, and that with the existing number and the state of the appropriation no compliance could be made. No new ratings were given the men on fire duty and the men received no eight-hour period off duty.

14. The evidence establishes that under Navy regulations the practice long prior to 1920 down to and including March 1, 1925, was to allow overtime only when employees were called for duty in an extraordinary emergency, i. e., one that requires efforts to avert imminent danger to life, limb, or property, such, for example, as floods, hurricanes, fires, aeroplane crashes, bursting steam pipes or water connections, etc.

15. The plaintiff received as Acting Chief of the Fire Department during the period from December 1, 1920, to March 1, 1925, pay amounting to $11,110.75, which included Sunday and holiday payments.

The total number of days which the Navy Yard record shows plaintiff was on duty in excess of 16 hours per day, is 738 days. Pay at plaintiff's regular rate for eight hours on each of the 738 days amounts to $5,833.12.

In each of the remaining cases reference was made by the court in the several findings of fact, Nos. 16 to 38, inclusive, to the findings Nos. 1 to 14, inclusive, in No. 43861, *supra*, and said findings Nos. 1 to 14, inclusive, were thereby included in, and made a part of, the findings in each of said remaining cases, Nos. 43861–43884, inclusive.

In each of the said remaining cases, Nos. 43862–43884, inclusive, the amounts severally received by the plaintiffs therein while on duty at the said Fire House during the period December 1, 1920, to March 1, 1925, including Sunday and holiday payments, were set forth in the several findings of fact by the court; as well as the total number of days which the Navy Yard record showed that each plaintiff was on duty in excess of 16 hours, and the amount of pay at each said plaintiff's regular rate for the 8 hours to which each said plaintiff would be entitled.

The court decided that the plaintiffs were entitled to recover, as follows:

43861 W. J. Nolan, five thousand eight hundred thirty-three dollars and twelve cents ($5,833.12);

43862 L. Jacobson, two thousand eight hundred thirty-six dollars and twenty-four cents ($2,836.24);

43863 J. A. Higuera, two thousand three hundred and eighty-eight dollars and sixty-four cents ($2,388.64);

43864 Carolyn Hathaway, guardian of estate of C. H. Damsted, one thousand seven hundred twenty-two dollars and ninety-six cents ($1,722.96);

43865 R. Galleguillo, seven hundred one dollars and thirty-six cents ($701.36);

43866 F. G. Grigsby, two hundred twenty-one dollars and eighty-four cents ($221.84);

43867 K. H. Johnson, one thousand ninety dollars and forty-eight cents ($1,090.48);

43868 R. Dupouy, nine hundred eleven dollars and sixty-eight cents ($911.68);

43869 C. J. Degen, two hundred eleven dollars and sixty-eight cents ($211.68);

43870 W. L. Nolan, one thousand three hundred fifteen dollars and seventy-six cents ($1,315.76);

43871 R. C. Jensen, three hundred ninety-eight dollars and forty cents ($398.40);

43872 M. J. Roderick, one thousand three hundred nine dollars and eighty-four cents ($1,309.84);

43873 L. K. Moore, one thousand nine hundred eight dollars and thirty-two cents ($1,908.32);

43874 C. Lederer, seven hundred eighty-nine dollars and seventy-six cents ($789.76);
43875 M. Kelley, three hundred thirty-five dollars and twenty cents ($335.20);
43876 R. Dinkel, seven hundred seventy-three dollars and forty-four cents ($773.44);
43877 A. J. Mouchou, one thousand one hundred seventy-seven dollars and twelve cents ($1,177.12);
43878 C. R. Taylor, eight hundred thirty-three dollars and twenty-eight cents ($833.28);
43879 M. Knull, six hundred eighteen dollars and eighty-eight cents ($618.88);
43880 S. W. Ligon, two hundred forty-six dollars ($246.00);
43881 C. C. Johnson, two hundred fifteen dollars and sixty cents ($215.60);
43882 W. P. Brennan, three hundred eighty-nine dollars and eighty-eight cents ($389.88);
43883 C. F. Siebert, five hundred sixty-five dollars and twenty cents ($565.20);
43884 J. T. Weeks, sixty-seven dollars and eighty-four cents ($67.84).

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff in each of these cases was assigned to duty in the fire department in the defendant's Navy Yard at Mare Island, California. Each was given a classification, which, except for plaintiff W. J. Nolan, did not indicate his actual duties as a fireman. Each was paid the rate for his classification for an eight-hour day, with the usual privileges of sick and annual leave and extra pay for Sunday and holiday work. Defendant seems to claim that plaintiffs were paid time and one-half for Sunday when the usual practice did not call for such payment, but we think that is immaterial, if true. Plaintiffs were normally required to remain at the yard for the full twenty-fours of the day in order to be available for duty as firemen, if a fire or other emergency should occur.

As to eight of these hours beyond the normal eight-hour working day, the practice was not irregular. The order

of the Secretary of the Navy of December 1, 1920, quoted in No. 12 of the findings of fact, authorized requiring members of the fire fighting force to remain available "for an additional eight hours' nominal duty, in order to be within call in the event of a fire call, in consideration of being furnished quarters, heat and light, etc." Plaintiffs were furnished such accommodations, in consideration of their being so available.

Defendant's requirement that plaintiffs remain at the yard and hold themselves available for the third eight-hour period of the twenty-four was not consistent with the order of the Secretary of the Navy referred to in the preceding paragraph, which order contained the following language:

> * * * The eight-hour nominal tour of duty should be arranged so that each employee may have a third eight-hour period off duty.

The practice of requiring availability for twenty-four hours a day continued, however, until March 1, 1925.

An act of Congress, approved May 15, 1937, 50 Stat. 964, quoted in full in No. 2 of the findings of fact herein, provided:

> That jurisdiction is hereby conferred upon the Court of Claims of the United States to hear, determine, and render judgment upon the claims of [naming the plaintiffs] for extra labor over and above the sixteen-hour period of duty per day required to be performed at Mare Island Navy Yard, California, which extra labor over said period was not in accordance with the order of the Secretary of the Navy, dated December 1, 1920; * * *

The first question for the court is whether Congress meant that plaintiffs should be paid for actual labor performed within the third eight-hour period, or whether it meant that they should be paid for remaining available by staying on the premises for that period. If it meant the former, there is practically no proof as to how often or for how long plaintiffs were so engaged. We suppose that it was very little, since they would have been called upon during that time only in case of fire or other emergency.

We are persuaded by the language of the Committees on Claims in their respective reports to the Senate and House of Representatives, that the latter was the legislative mean-

ing. The two reports are identical. (See Senate, 75th Congress, 1st Session, Report No. 440, to accompany H. R. 1315; House of Representatives, 75th Congress, 1st Session, Report No. 111, to accompany H. R. 1315).

The reports speak of the complaints of the claimants "that they were in fact forced to be on duty and subject to call for the entire 24 hours every day, excluding Sundays"; that "they were required to be on duty, in attendance at the yard and subject to call for all hours of the day and night;" the reports say that "claimants maintain, with proof, that *they actually served the 24-hour period.*" [Italics supplied.] The reports further say "The bill is merely jurisdictional, and, we feel, if these claimants were in fact required to serve as they allege, they are entitled to the opportunity of establishing their claims before the Court of Claims."

There is no word in the committee reports about actual labor performed by plaintiffs during the third eight-hour period. Congress was aware, as we are, that plaintiffs must have, except on occasions of emergency, spent the period in sleep and having breakfast and getting ready to report at eight o'clock in the morning for their regular tour of duty. It is evident that the merit of these claims, in the eyes of Congress, was not that the claimants had actually worked without compensation, but that they had been required to stand by and be on call through the entire twenty-four hours of the day, without compensation. While the words "extra labor" used in the special act are not a completely apt description of what was required of plaintiffs, we have no doubt as to what Congress meant.

We are, then, to determine whether plaintiffs were so required to stand by for emergency calls, and if so, for how many days. We find that they were so required, and for the number of days recited in the findings of fact. They should be compensated at the regular daily rate which they were receiving on those days for their regular duties. We recognize that the proof of the actual number of days of stand-by service required of plaintiffs is not as clear as could be desired. What is shown is that on the days counted, plaintiffs worked their regular daytime tour of

duty; that there was no special reason why they would not have been required to stand by at night; that it was customary to require them so to stand by. In those circumstances it is probable that they were required to stand by. No further proof is available. Congress having regarded the defendant as the party in fault, it cannot escape liability because it did not keep records from which clearer proof could be gathered.

Plaintiffs seem to argue that the rate should be one and one-half times the regular rate. We see no basis in the special act for that contention. Whether or not plaintiffs might have been entitled, under the general law and the regulations of the Navy Department, to have been paid time and one-half for the actual time spent in emergency service we do not decide. Such rights, if any, have long since been barred by the statute of limitations, and were not revived by the special act. Besides, no adequate proof of the actual time so spent has been offered.

Judgment will be entered for each of the plaintiffs in the amount specified in each case. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

THE MERCHANTS NATIONAL BANK OF MOBILE v. THE UNITED STATES

[No. 44094. Decided April 7, 1941]

On the Proofs

Stamp tax on shares of national bank issued to Reconstruction Finance Corporation.—Where a national bank in 1934 issued shares of its preferred stock to the Reconstruction Finance Corporation, on which stamp taxes were collected under section 800 of the Revenue Act of 1926, amended by section 722 of the Revenue Act of 1932 (47 Stat. 169, 272); it is *held* that plaintiff is not entitled to refund of said stamp tax under the provisions of the Act of March 20, 1936 (49 Stat. 1185) exempting from taxation shares of preferred stock of national banks (and others) held by the Reconstruction Finance Corporation.

Same.—Where the stamp tax on the issue of preferred stock of a national bank acquired by the Reconstruction Finance Corporation was not levied against nor collected from the said Reconstruction Finance Corporation but from said national bank, such issue of preferred stock was not exempt from said stamp tax under the Act of March 20, 1936.

Same; exemption.—It is a well-established rule that an exemption from taxation must be clearly declared by the language of the statute which it is claimed confers such exemption.

Same.—The statute under which exemption is claimed in the instant case was enacted in order to remove not only the inequality of treatment as between State and National bank stocks but also because of the varying rates of taxation levied by the several States.

The Reporter's statement of the case:

Mr. D. F. Prince for the plaintiff. *Mr. Geo. E. H. Goodner* was on the briefs.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. Messrs. *Robert N. Anderson* and *Fred K. Dyar*, were on the brief.

Upon the stipulation of the parties and the evidence adduced, the court made special findings of fact as follows:

1. Plaintiff is a national bank incorporated under the laws of the United States, and is engaged in the banking business, with its principal place of business at Mobile, Alabama.

2. Prior to January 9, 1934, plaintiff filed with the Reconstruction Finance Corporation its application for the purchase at par by that corporation of $500,000 par value of its preferred stock. On January 9, 1934, the Reconstruction Finance Corporation, by action of its executive committee, resolved to buy 20,000 shares, $500,000 par value, of the preferred stock of plaintiff and authorized its proper officers to carry out that action.

3. Pursuant to the application of plaintiff and the resolution of the Reconstruction Finance Corporation, mentioned in Finding 2, plaintiff sold 20,000 shares of its preferred stock, par value $500,000, to the Reconstruction Finance Corporation and on February 6, 1934, issued and delivered a temporary certificate for those shares to the Reconstruction Finance Corporation. At that time no documentary stamp was attached to the certificate, but on July 26, 1934, in obedience to the demand of an Internal Revenue Agent, United States

Documentary Stamp No. D39588D was affixed to sheet 1 A of plaintiff's general ledger, where the sale of the stock was recorded, and duly cancelled. Plaintiff paid the defendant $500 for that stamp, no part of which has been refunded to plaintiff.

4. On February 1, 1934, the plaintiff issued a certificate to the Comptroller of the Currency certifying that its shareholders had adopted a resolution providing for the issuance of preferred stock in the sum of $500,000 and that the sum of $500,000 had been paid into the bank in cash for the preferred stock and the premium thereon.

5. On February 1, 1934, the plaintiff issued an "Interim Receipt For Payment of Purchase Price of Preferred Stock In The Merchants National Bank of Mobile, Alabama."

6. On February 6, 1934, the Comptroller of the Currency issued a certificate approving the issuance by the plaintiff of preferred stock in the sum of $500,000.

7. On February 6, 1934, plaintiff issued the temporary certificate referred to above, certifying that the Reconstruction Finance Corporation was the owner of twenty thousand fully paid and non-assessable shares of the par value of twenty-five dollars ($25.00) each of the preferred stock of the plaintiff.

8. On August 8, 1934, plaintiff retired the twenty thousand shares of stock which it had sold to the Reconstruction Finance Corporation on February 6, 1934, and the temporary certificate was returned to the plaintiff by the Reconstruction Finance Corporation which had held it from February 6, 1934, to August 8, 1934.

9. On March 27, 1936, plaintiff filed with the Collector of Internal Revenue for the District of Alabama, a claim for refund of the amount paid by it for the documentary stamp No. D39588D, upon the ground that

> The issue of $500,000 of preferred stock was negotiated and sold directly to the R. F. C. and the stock issued in that name.

and that the act of March 20, 1936, Public No. 482, provides for the exemption from taxation of shares of preferred stock of national banking associations while owned by the Reconstruction Finance Corporation. This claim was rejected by the Commissioner of Internal Revenue on September 29, 1936.

The court decided that the plaintiff was not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The question presented in this case is whether plaintiff is entitled to a refund of the stamp tax paid by it on 20,000 shares of its preferred stock which it issued to the Reconstruction Finance Corporation. The tax was collected under section 800 of the revenue act of 1926 and that act as amended by section 722 of the revenue act of 1932, by which sections a stamp tax at a specified rate was imposed on the original issue of shares of corporate stock. (47 Stat. 169, 272.)

The parties are agreed that the tax in question was properly collected unless the plaintiff was exempted from the provisions of that act by the act of March 20, 1936, 49 Stat. 1185, by reason of the fact that plaintiff's stock was issued to the Reconstruction Finance Corporation. That statute reads in part as follows:

> Notwithstanding any other provision of law or any privilege or consent to tax expressly or impliedly granted thereby, the shares of preferred stock of national banking associations, and the shares of preferred stock, capital notes, and debentures of State banks and trust companies, heretofore or hereafter acquired by Reconstruction Finance Corporation, and the dividends or interest derived therefrom by the Reconstruction Finance Corporation, shall not, so long as Reconstruction Finance Corporation shall continue to own the same, be subject to any taxation by the United States, by any Territory, dependency, or possession thereof, or the District of Columbia, or by any State, county, municipality, or local taxing authority, whether now, heretofore, or hereafter imposed, levied, or assessed, and whether for a past, present, or future taxing period.

At the outset it should be observed that the tax in question was not levied against or collected from the Reconstruction Finance Corporation; the tax was collected from the plaintiff, a national bank, on account of the issuance of its stock to the Reconstruction Finance Corporation. Apparently the only manner in which the tax could even indirectly have affected the Reconstruction Finance Corporation was that the tax would constitute an expense of plaintiff and therefore would reduce the income which would otherwise be available for

the payment of dividends on the stock to the Reconstruction Finance Corporation. Having in mind the well-established rule that an exemption from taxation must be clearly declared by the language of the statute which it is claimed confers such exemption, it is difficult to see how it could be said that this exempting statute (which undertakes to exempt from tax stock in a national bank when held by the Reconstruction Finance Corporation) could be held to exempt a national bank from a transfer tax on the issuance of that stock to the Reconstruction Finance Corporation.

This exempting statute was enacted by reason of a court decision which held that stock of a national bank when held by the Reconstruction Finance Corporation was subject to state and municipal taxes (*Baltimore National Bank* v. *State Tax Commission of Maryland*, 297 U. S. 209, affirming a decision by the Court of Appeals of Maryland, 169 Md. 65, 180 Atl. 260). In that case the State Tax Commission of Maryland was seeking to collect a direct tax from a national bank on account of the bank's stock which the Reconstruction Finance Corporation owned, and while the bank was being required to pay the tax the right of reimbursement existed on the part of the bank from its stockholders, in that instance the Reconstruction Finance Corporation. Stock of state banks was not similarly taxed in the State of Maryland where the case arose, and in many states stock of national banks was either not taxed at all or was taxed at varying rates. As will appear from the report of the Senate Committee on Banking and Currency, the exempting statute was enacted in order to remove not only the inequality of treatment as between state and national bank stocks but also because of the varying rates of tax levied by the several states. A further consideration was that taxes of that nature levied by a state or municipality on the stock of a national bank, collected from the bank, and deducted from the funds otherwise payable to the Reconstruction Finance Corporation, might well wipe out the small margin of profit which the Reconstruction Finance Corporation would receive from making such an investment (Senate Report No. 1545, 74th Congress, 2d Session).

Clearly the case with which we are concerned is vastly different from that which gave rise to the exempting statute

in question. Here no attempt is being made to levy a tax on national bank stock held by the Reconstruction Finance Corporation nor is it sought to collect a tax from the Reconstruction Finance Corporation. The tax is levied against the plaintiff, a national bank, on the issuance of its stock to the Reconstruction Finance Corporation and is not a tax on the plaintiff's stock when held by the Reconstruction Finance Corporation. At most the Reconstruction Finance Corporation could be affected only in an indirect manner. Only by implication could the exemption be held to apply to plaintiff and that is forbidden by well-established rules of statutory construction. (*United States Trust Co., Executor* v. *Helvering*, 307 U. S. 57.) Since no express exemption is set out in the statute which would relieve plaintiff from the tax burden complained of, the exaction must be sustained.

Plaintiff's petition is accordingly dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

THE S. S. WHITE DENTAL MANUFACTURING COMPANY v. THE UNITED STATES

[No. 44602. Decided April 7, 1941]

On the Proofs

Income tax; obsolescence.—Where plaintiff, a manufacturing concern operating a plant at Frankford, Pa., and another at Philadelphia, Pa., as well as the main plant at Staten Island, N. Y., in 1936 erected a new building in connection with said main plant and removed to said new building the machinery and equipment from the said Philadelphia plant, and later sold the building in Philadelphia which had been abandoned for its purposes; and where the evidence shows that such consolidation was made not because of the inadequacy or unsuitability of said abandoned building in Philadelphia but for purposes of economy in operation; it is *held* that plaintiff is not entitled under section 23 of the Revenue Act of 1936 and the applicable Treasury Regulations to deduction for obsolescence of the said abandoned building in its income tax for 1936.

Same.—It is practically impossible to find a definition of obsolescence that may be applied generally to all cases.

Same.—To establish obsolescence for purposes of income tax deduction it is required that the taxpayer show that the physical properties are being affected by economic conditions that will result in abandonment at a date prior to the end of the normal useful life of said properties; that the time of beginning of obsolescence be shown; and that a reasonably definite time be ascertained when said properties will be obsolete.

Same.—Where a manufacturing plant is abandoned only because of the erection of an addition to another plant to which the activities of the said abandoned plant are transferred, for operating economies; it is *held* that taxpayer is not entitled to an allowance for extraordinary obsolescence under section 23 (1) of the Revenue Act of 1936, which requires as a prerequisite to an obsolescence allowance proof that the abandoned property was in fact obsolescent.

Same.—The mere fact of abandonment and transfer therefrom of machinery and equipment to a newly erected building is not proof of obsolescence of a manufacturing plant.

Same.—It is incumbent upon taxpayer claiming allowance for obsolescence on account of an abandoned manufacturing plant to produce evidence showing obsolescence; and where proof is so meager as to leave in doubt the existence and degree of obsolescence, the allowance will be denied.

The Reporter's statement of the case:

Mr. Harry Levine for the plaintiff.

Mr. John W. Hussey, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is a manufacturing corporation organized and operating under the laws of the Commonwealth of Pennsylvania, with its principal office at Philadelphia.

2. During 1936 plaintiff carried on its manufacturing operations in two plants in Pennsylvania, one at Frankford and the other at Northwood, and in its plant in the State of New York at Staten Island, in the City of New York.

In 1936 and 1937 the plant at Northwood was in good condition, adequate for plaintiff's manufacturing operations, in an industrial center, within easy access to housing accommodations and other facilities used by employees.

3. At a meeting of the executive committee of plaintiff on April 1, 1936, resolutions were adopted providing for the transfer of operations in the Northwood plant to the Staten Island factory, a new building to be erected at Staten Island at an estimated cost of $170,000 to house the consolidated operations, consideration later to be given to the transfer also of Frankford operations to Staten Island, the ultimate result of the program to effect economies estimated at $110,000 a year. The expenses estimated in the resolution for removing operations from Northwood to Staten Island were as follows:

Moving equipment	$16,914
Moving employees	5,000
Rearranging factory activities	2,500
	24,414

The result to be obtained from the removal from Northwood was an estimated annual saving in expense of $30,649.

At a later meeting, May 20, 1936, a maximum price of $178,000 for a new four-story building on Staten Island and $29,800 for a basement was approved.

4. Plaintiff entered into a contract May 22, 1936, for construction of the new building. Supplemental contracts for supplying and installing special equipment were entered into on July 21, 1936, October 2, 1936, and January 23, 1937. The new plant was completed by April 1, 1937, and all departments of the Northwood plant were moved into it on or before May 1, 1937. The Northwood plant was thereupon vacated and abandoned and was not thereafter used by the plaintiff.

5. Plaintiff's directors in 1936 estimated that the sale or salvage value of the Northwood plant at the time of its expected abandonment on April 1, 1937, would be $75,000. A reasonable estimate of its sale or salvage value April 1, 1937, was $75,560.

In 1936 the Northwood plant was offered for sale and it was actually sold July 1, 1937, for a gross amount of $90,000. Expenses connected with the sale totaled $6,839.50, leaving realized $83,160.50.

6. Plaintiff filed a tentative income and excess-profits tax return for the calendar year 1936 on March 15, 1937, and filed its completed return on April 15, 1937, reporting net income of $532,555.18, and total taxes due thereon of $83,660.87. The taxes were paid as follows:

March 15, 1937	$22, 250. 00
June 16, 1937	19, 580. 44
September 20, 1937	20, 920. 22
December 15, 1937	20, 910. 21

7. Pursuant to the report of a revenue agent, the Commissioner of Internal Revenue increased plaintiff's net income by $816.85, and on July 22, 1937, he assessed an additional tax thereon of $230.15, which amount was paid by plaintiff July 24, 1937.

8. Plaintiff kept its books and filed its returns on an accrual basis of accounting. It claimed no deduction in the return for 1936 for obsolescence of the plant at Northwood.

9. On April 1, 1936, the date plaintiff determined to abandon the plant at Northwood, its cost, less depreciation previously allowed by the Commissioner, was $170,504.45.

10. On April 28, 1938, plaintiff filed a claim for refund of the full amount of taxes paid by it for 1936. This claim, after reciting certain facts herein found, stated as a reason for allowance the following:

> (a) On its 1936 return, the corporation failed to make any claim for extraordinary obsolescence of its Northwood plant suffered by reason of the decision made to abandon it. It now claims an allowance for obsolescence measured by the difference between the depreciated cost of the buildings, machinery, and equipment at April 1st, 1936, and their estimated salvage or sale value in 1936 spread over the period from April 1st, 1936, to April 1st, 1937, when the Staten Island plant was ready for occupancy.
>
> On the basis of cost less depreciation (as used for tax purposes) of $170,504.45 and the estimated sale value as appraised of $75,000.00, the corporation suffered extraordinary obsolescence amounting to $95,504.45. The allowance which the corporation claims for 1936 is three-fourths thereof, or $71,628.34, nine out of twelve months' extraordinary obsolescence having occurred in 1936.

The claim for refund had not been formally acted upon when this suit was instituted February 2, 1939, but more than six months had elapsed after the claim had been filed.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff, a manufacturer of dental supplies, operated three plants during and previous to the year 1936; one at Northwood, in the suburbs of Philadelphia, one at Frankford, Pennsylvania, and one at Staten Island, New York City.

On April 1, 1936, the Board of Directors decided to build an additional plant in connection with the main plant at Staten Island and to move the machinery and personnel of the Northwood plant to the new plant at Staten Island and to dispose of the buildings and grounds at the Northwood plant as soon as the Staten Island plant should be ready, which it was estimated would be within about one year.

The pertinent part of the minutes of the meeting of the executive committee held April 1, 1936, is as follows:

> *Resolved*, That operations now housed in Northwood Plant are to be transferred to Staten Island Factory. To consolidate these operations there is to be erected at Staten Island a new building, the cost of which is estimated at $170,000.00. In addition to this capital investment, there will be expenses estimated as follows:

Moving Equipment	$16, 914. 00
Moving Employees	5, 000. 00
Rearranging Factory Activities	2, 500. 00
	24, 414. 00

> The result to be obtained is an estimated annual saving in expense of $30,649.00.
>
> The ultimate result of the adoption of this plan is the housing of all manufacturing operations and Head Office Departments incidental to manufacturing at Staten Island Plant, thereby effecting economies estimated at $110,000.00 a year.
>
> At a later date, after the Northwood moving has been completed, consideration will be given to the transfer of Frankford operations to Staten Island.
>
> C. A. THOMAS, *Secretary*.

This action is brought for the recovery of $18,187.66 of the income and undistributed profits taxes paid by plaintiff for the year 1936.

Plaintiff claims this amount as a deduction for extraordinary obsolescence upon the consolidation of two of its plants and the consequent abandonment and disposition of one.

The plaintiff relies upon section 23 of the Revenue Act of 1936 (49 Stat. 1648, 1658). The applicable part of that section is as follows:

> SEC. 23. DEDUCTIONS FROM GROSS INCOME.
>
> In computing net income there shall be allowed as deductions: * * *
>
> (1) *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence.

Treasury regulations issued under the Revenue Act of 1936 are in part as follows:

> ART. 23 (1)–1. *Depreciation.*—A reasonable allowance for the exhaustion, wear and tear, and obsolescence of property used in the trade or business may be deducted from gross income. For convenience such an allowance will usually be referred to as depreciation, excluding from the term any idea of a mere reduction in market value not resulting from exhaustion, wear and tear, or obsolescence. * * *
>
> ART. 23 (1)–2. *Depreciable property.* The necessity for a depreciation allowance arises from the fact that certain property used in the business gradually approaches a point where its usefulness is exhausted. The allowance should be confined to property of this nature. In the case of tangible property, it applies to that which is subject to wear and tear, to decay or decline from natural causes, to exhaustion, and to obsolescence due to the normal progress of the art, as where machinery or other property must be replaced by a new invention, or due to the inadequacy of the property to the growing needs of the business. * * *
>
> * * * * *
>
> ART. 23 (1)–6. *Obsolescence.*—With respect to physical property the whole or any portion of which is clearly shown by the taxpayer as being affected by economic conditions that will result in its being abandoned at

a future date prior to the end of its normal useful life, so that depreciation deductions alone are insufficient to return the cost or other basis at the end of its economic term of usefulness, a reasonable deduction for obsolescence, in addition to depreciation, may be allowed in accordance with the facts obtaining with respect to each item of property concerning which a claim for obsolescence is made. No deduction for obsolescence will be permitted merely because, in the opinion of a taxpayer, the property may become obsolete at some later date. This allowance will be confined to such portion of the property on which obsolescence is definitely shown to be sustained and cannot be held applicable to an entire property unless all portions thereof are affected by the conditions to which obsolescence is found to be due.

Numerous decisions are cited by both plaintiff and defendant.

It is practically impossible to find a definition of obsolescence that may be applied generally to all cases. Most of the definitions that are set out in the numerous decisions are intimately linked to the facts in each case.

It is required that the taxpayer show that the physical properties are being affected by economic conditions that will result in their being abandoned at a future date prior to the end of their normally useful life; that the time of the beginning of the obsolescence be shown; and that a reasonably definite time be ascertained as to when the property will become obsolete.

The question presented is whether a taxpayer is entitled under Section 23 (1) to an allowance for extraordinary obsolescence of a plant solely because of its abandonment after erection of an addition to another plant and the transfer of the activities of the abandoned plant to the new addition. The question must be answered in the negative for the reasons, briefly, that Section 23 (1), as construed by the courts and the Board of Tax Appeals, requires as a prerequisite to an obsolescence allowance proof that the abandoned property was in fact obsolescent, and that the mere fact of abandonment and transfer to a newly erected building fails to supply this prerequisite.

It is incumbent upon taxpayer to place in the record evidence showing obsolescence and where facts appearing therein are so meager as to leave the existence and degree of obsolescence matters of conjecture, the allowance will be denied. *Rising Sun Brewing Co.* v. *Commissioner*, 22 B. T. A. 826; *Appeal of Benjamin Booth & Co.*, 4 B. T. A. 248.

We do not believe that the facts in this case justify a finding that the physical properties were obsolescent.

The facts clearly indicate that the underlying reason for the abandonment and disposition of the Northwood plant was to save the extra operating costs of maintaining the two plants. The ultimate purpose, as disclosed by the minutes of the directors' meeting and by the testimony, was to abandon the third plant also and to consolidate the entire operations at the headquarters plant at Staten Island.

The Northwood plant was adequate. It was located in a desirable industrial center. It was easily accessible for all purposes. It was in good condition and satisfactory in operation. The primary reason for the decision to consolidate the two plants at Staten Island was that current expenses of operation could be reduced thereby. The manager of the Staten Island plant and one of the directors of the plaintiff company, testified as follows:

> 21. X Q. Were you a party to the decision to close the Northwood plant and transfer the activities of the corporation to New York?—A. Yes.
>
> 22. X Q. The Northwood plant was in good condition, was it?—A. Yes.
>
> 23. X Q. The business of the corporation was not suffering any by reason of the plant being located at Northwood, was it?—A. Only the extra expense of running two organizations.
>
> 24. X Q. You felt that there would be an economy by concentrating the two plants in one?—A. Yes.
>
> 25. X Q. Aside from that, the plant at Northwood was satisfactory and was not inadequate?—A. No.
>
> 26. X Q. It was all right except for that one point that you raised?—A. Yes.

This particular witness, who had been with the company 32 years and who knew more about the details of plaintiff's business than any other witness, at no time intimated that the plant was inadequate, or that it was becoming or was

even likely to become obsolete. His testimony on the contrary was to the effect that the plant was adequate and satisfactory, and that the sole reason for consolidation and disposition was the saving of operating costs. He did not indicate that there was any functional depreciation in any way.

The only witness who indicated that the factory was outmoded in any way was the real estate expert who made the appraisal for the plaintiff company. He gave as a reason the fact that most of the people today want a streamlined factory. He said he was not a builder nor an engineer. He, of course, was not familiar with the details of plaintiff's business. The manager of the Staten Island plant was better qualified to judge as to the adequacy of the plant than was the real estate expert. The manager testified that the Northwood plant was satisfactory and not inadequate.

The change was made pursuant to a resolution adopted by the Board of Directors. Significantly no mention is made anywhere in the resolution of obsolescence as a reason for the action taken.

In this particular instance all the equipment was transferred from the Northwood to the new Staten Island plant. The equipment, therefore, is not involved. The question is whether the buildings were on the way to becoming obsolete.

The appraiser in his report to the plaintiff company described in detail the physical properties.[1]

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[1] In compliance with your request, I made an inspection of the property known as the Northwood plant situated at the northwest corner of Unity and Oakland Streets in the Twenty-third Ward of the City of Philadelphia, Pennsylvania, which consists of an improved piece of ground with a frontage of 318 feet 11⅛ inches along the east side of Oakland Street, 50 feet wide, by a depth of 205 feet 10⅛ inches along the north side of Unity Street, 50 feet wide, and 276 feet 10¼ inches along the south side of the Frankford branch of the Philadelphia and Reading Railroad, with 444 feet 11¼ inches frontage along the south side of Horrocks Street, not opened, in the rear and containing a total ground area of approximately 87,120 square feet. Street improvements are in.

The location is in the well known Frankford industrial center and is within close proximity to the heart of the city and enjoys easy means of distribution to any part of the city or its suburban areas with numerous good roads and adequate trolley and bus transportation facilities. Within a short radius of the plant are adequate housing accommodations with splendid recreational, school, church and shopping facilities.

Erected on the lot are 10 buildings as follows:

Building No. 1: A 3-story (no basement) well-lighted, modern brick factory building, approximately 241 feet by 64 feet, of slow-burning interior con-

There is no evidence that any of these buildings were in other than first-class condition. On the contrary, the appraiser's report shows them to be in good condition.

We find that the evidence fails to show that the physical plant in Northwood on April 1, 1936, was on the way to becoming obsolete. Under the facts as disclosed by the evidence the plaintiff is not entitled to recover on the ground of obsolescence. *Real Estate Title Co.* v. *United States*, 309 U. S. 13, 15, 16, 17; *The Olean Times-Herald Corporation* v. *Commissioner*, 37 B. T. A., 922–24–25.

From the *Real Estate Title Co.* case, *supra*, we quote:

> This Court, without undertaking a comprehensive definition, has held that obsolescence for purposes of the revenue acts "may arise from changes in the art, shifting of business centers, loss of trade, inadequacy, supersession, prohibitory laws and other things which, apart from physical deterioration, operate to cause plant elements or the plant as a whole to suffer diminu-

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struction with asphalt roof, wood floors, serviced with hot and cold water, gas and electricity; sprinkler throughout, with three fire towers; toilet rooms on each floor; 25,000-gallon sprinkler tank at the top of the stair well; having an average ceiling height of over 16 feet; equipped with a 4,000-pound freight elevator and 21,000-pound built-in Howe floor scales on the first floor, a fireproof storage vault under each of the two end fire towers. Underground tunnel connects buildings No. 1 and No. 2.

Building No. 2: One-story brick and concrete building with heavy Monitor type timber roof, slag finished; equipped with a 150-horsepower boiler for heating various buildings and supplying process steam and hot water and a 350-gallon hot-water generator; a used compressor unit; vaccum pump; vacuum receiving tank and a new boiler injector pump.

Building No. 3: One-story brick building approximately 10 x 20, containing a 1,000-gallon steam fire pump connected to a 150-horsepower boiler.

Building No. 4: One-story brick L-shaped building approximately 28 x 45, with slag-finished timber roof, used as a garage.

Building No. 5: One-story brick, steel, and concrete fireproof building, approximately 56 x 45, with Monitor type roof, toilet and shipping facilities; equipped with a large stack and breeching and known as the "Burning" room.

Building No. 6: One-story triangular-shaped fireproof, brick, steel, and concrete building, approximately 32 x 40, which has an extension of building No. 5.

Building No. 7: One-story fireproof building irregularly shaped, about 46 x 12½, with high ceiling.

Building No. 8: Three-story and basement brick dwelling, approximately 48 x 35, used as a cafeteria, rest room and first aid unit, and heated from main boiler room.

Building No. 9: Series of wooden storage sheds on a concrete base, and equipped with sliding doors in front of each bin. Approximate dimensions 80 x 12.

Building No. 10: One-story brick tool house, about 10 x 12.

Containing a total area of about 50,000 square feet, which refers to all of the buildings.

tion in value." * * * Such specific examples illustrate the type of "economic conditions" whose effect on physical property is recognized as obsolescence by the Treasury Regulations. Others could be mentioned which similarly cause or contribute to the relentless march of physical property to the junk pile. But in general, obsolescence under the Act connotes functional depreciation, as it does in accounting and engineering terminology. * * * To be sure, reasons of economy may cause a management to discard a title plant either where it has become outmoded by improved devices or where it is acquired as a duplicate and therefore is useless. But not every decision of management to abandon facilities or to discontinue their use gives rise to a claim for obsolescence. For obsolescence under the Act requires that the operative cause of the present or growing uselessness arise from external forces which make it desirable or imperative that the property be replaced.

James M. Talbot is one of the directors of the company. He was present when the decision was made and had a part in it. He had peculiar knowledge of the motives that actuated the change. To his credit it may be said that he made no effort to shade or color his testimony.

However, the minutes of the directors' meeting, the fact that the equipment was moved and not discarded, the favorable location of the Northwood plant, the stated purpose of operative saving, the good condition of the buildings at Northwood, all indicate with compelling force that it was a desire to save operating expenses and not obsolescent buildings that caused the plaintiff to consolidate the two plants, transfer the equipment and dispose of the building and grounds of the Northwood plant.

Judgment will be entered for the defendant.

It is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WILLIAM B. SCHEIBEL v. THE UNITED STATES

[No. 44634. Decided April 7, 1941]

On the Proofs

Pay and allowances; lieutenant in the Coast Guard; dependent mother.—Under the provisions of the Act of June 10, 1922, it is *held* that the testimony shows that plaintiff's mother was "dependent" within the meaning of the statute.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plantiff. *King & King* were on the briefs.

Mr. Louis R. Mehlinger, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in part as follows:

1. Plaintiff is a lieutenant in the United States Coast Guard, and has been a commissioned officer therein over ten years.

2. When he was a student Naval aviator at Pensacola Florida, August 12, 1935, his father died leaving surviving him his wife, three sons, and one daughter. He left no property except life insurance, the entire proceeds of which, amounting to $4,576, went to the widow. Plaintiff and his sister added $424 to this fund, and it was converted into a certificate of deposit for $5,000, in favor of the widow, interest of approximately $162 thereon accruing to her annually thereafter.

3. Since the father's death one of plaintiff's brothers has contributed nothing to his mother's support, the other brother in irregular amounts an average of about $20 a year. Plaintiff's sister has been employed in Omaha, Nebraska, at a salary of about $1,200 a year, and plaintiff has had an arrangement with her whereby he has allotted to her $600 a year, out of which, it was agreed between plaintiff and his sister, she would take care of her mother when her mother visited her. She has taken care of the mother while the mother was with her in Omaha, in a house purchased by plaintiff and his sister, and kept the house in repair.

From the time of the father's death the mother lived with her daughter in Omaha until about October 19, 1936, when she left Omaha and after tarrying at Washington, D. C., arrived at plaintiff's house in Florida the early part of December 1936. During this time that the mother was in Omaha, plaintiff sent her several hundred dollars for her living expenses. Thereafter she lived with the plaintiff except for two or three months a year, during the hurricane season, when she lived with her daughter in Omaha, until June 15, 1939, from which date to December 15, 1939, when testimony was taken in this case, she stayed with her daughter in Omaha because of plaintiff's anticipated transfer to a new station.

4. During the period here involved plaintiff's mother has been in poor health, requiring constant medical attention. She has not been gainfully employed and has been unable to work. Except for her residence with the daughter, the mother has made her home with plaintiff. * * * By reason of the fact that the mother has spent the greater part of the year with plaintiff, maintenance of their home has been a continuing one since December 1936. Even after she left Florida in June 1939, plaintiff maintained for her the home which she had previously occupied with him there, because of uncertainty as to whether or not he would be transferred to a new station. Except during the time that she was with her daughter in Omaha, all of her expenses have been paid by the plaintiff except for her income of $162 a year. She has been, since the father's death August 12, 1935, dependent upon plaintiff for her chief support.

Public quarters have not been available for her at any time.

5. Plaintiff first claimed increased allowances on account of a dependent mother March 11, 1938. This claim covered the period since his father's death, was rejected for form and resubmitted to cover the period from his father's death to June 30, 1938, and it has not been paid.

He was furnished bachelor quarters consisting of one bedroom at the Naval Air Station, Pensacola, Florida, from August 13, 1935, to October 15, 1936. * * *

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is based on Sections 4, 5, and 6 of the Act of June 10, 1922, 42 Stat. 625, 627, 628, as amended by the Act of May 31, 1924, 43 Stat. 250. Section 4 of the 1922 Act is as follows:

> That the term "dependent" as used in the succeeding sections of this Act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent on him for her chief support.

The findings of fact show that the plaintiff's mother has been, since her husband's death on August 12, 1935, dependent upon him for her chief support. As to most of the period there is no question. As to the period from August 1935 to December 1936, the evidence is not as clear as it might be. The mother was with plaintiff's sister in Omaha. The sister's income was $100 a month. She lived in a house which plaintiff had helped her to purchase. He allotted her $50 a month out of his pay, $25 of which was to keep the house in repair and $25 to take care of their mother when she should visit the sister. During the mother's protracted stay with the sister in 1935–1936, plaintiff sent to the mother "most of $600" out of his bank account, and "additional money I had scraped up." After the mother came to live with plaintiff, she was almost entirely supported by him. Dependence, in its nature, tends to be a continuous thing. The expenses of people in such circumstances would not greatly vary, their incomes were fixed, and the definite evidence as to the greater portion of the period satisfies us as to the whole period. Plaintiff is entitled to recover.

Plaintiff may not recover full rental allowances for the period from August 13, 1935, to October 15, 1936, while he was occupying the bachelor quarters furnished him during that time. *Byrne* v. *United States*, 87 C. Cls. 241.

The claim is a continuing one and entry of judgment is therefore suspended pending receipt from the General Accounting Office of a report showing the amount due plaintiff in accordance with the opinion of the court.

It is so ordered.

JONES, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JAMES L. HARBAUGH, JR. v. THE UNITED STATES

[No. 44694. Decided April 7, 1941]

On the Proofs

Pay and allowances; bachelor officer in the United States Army; dependent mother.—Where a bachelor officer in the United States Army, whose father is living but is aged and unemployed, contributed the greater part of the funds needed for the joint support of his parents, it is *held* that he is entitled to recover for increased rental and subsistence allowances for a dependent mother.

The Reporter's statement of the case:

King and *King* for the plaintiff. *Mr. Fred W. Shields* was on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact in part as follows:

1. The plaintiff, a bachelor officer of the United States Army, was first appointed second lieutenant, United States Army, on March 1, 1918; was promoted to first lieutenant on October 20, 1919, and on December 15, 1922, was discharged as first lieutenant and appointed a second lieutenant; was again promoted to first lieutenant on September 23, 1923, and promoted to captain on August 1, 1935, which rank he now holds.

2. Plaintiff's father is 78 years of age. He was formerly engaged in the luggage and leather business, but failed in his business in 1930 and since that time has held no employment

except for a period of about six months during 1931, when he held part-time employment in a luggage establishment. He owns no real property and the only personal property owned by him, other than his small personal possessions, is ten shares of Transamerica stock valued at about $6.00 per share. He has contributed nothing to the support of his wife since 1930.

3. Plaintiff's mother, Mrs. Minnie D. Harbaugh, is 71 years of age. She was employed for many years as Executive Secretary for the Sacramento Federation of Churches, but was forced to relinquish her position on September 30, 1936, on account of poor health. While so employed she was paid a salary of $60.00 per month but received only $20.00 during the last month of her employment.

4. (It was found that plaintiff's mother owned no real property, but did own several items of personal property, consisting largely of shares of stock, which as of April 1940 was of nominal value.) * * *

5. Plaintiff's mother was seriously ill from 1936 to 1939, requiring medical and hospital treatment, which cost about $1,300.00 during that period. Her condition is now somewhat improved but she is still a semi-invalid.

6. Plaintiff's parents reside in a rented house located at 1312 26th Street, Sacramento, California. Their son Wellington is employed as a traveling salesman for a San Francisco Company and his occupation requires him to visit Sacramento fairly regularly and when he visits Sacramento he stays with his parents and can be said to live with them perhaps as much as one-half of the time.

7. During the period from September 1, 1936, to July 1, 1939, the joint average monthly living expenses amounted to about $142.00 * * *.

Of this joint living expense of approximately $142.25, about $65.00 is attributable to the mother alone, $50.00 to the father, and about $30.00 to the son, Wellington.

8. Since July 1, 1939, the average joint monthly living expenses have increased to $160.00, the increase having been caused by the father's illness, which in turn necessitated the hiring of a full-time maid to assist the mother, and an increase of $2.50 per month in the rent.

Of this joint monthly living expense about $70.00 is attributable to the mother alone, $60.00 to the father, and $30.00 to the son, Wellington.

9. From September 1, 1936, to July 1, 1939, plaintiff contributed $76.00 a month to his mother, and since July 1, 1939, he has contributed $100.00 a month to her.

His brother Wellington has contributed $60.00 a month to his father during the same period, which contribution is deposited in a joint bank account and utilized to pay the joint household expenses, including that portion of such expenses as are attributable to Wellington when he is visiting his parents.

10. The plaintiff's parents' only other source of income since September 1, 1936, is a small income of from $3.00 to $5.00 per month which the mother realizes from her stock, and $25.00 in cash which was given to her as a Christmas present in 1936 by her former employers. Plaintiff is in fact the chief support of his mother.

11. Plaintiff has filed claim for increased rental and subsistence allowances in the General Accounting Office on account of a dependent mother, which claim was disallowed by that office. * * *

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

The plaintiff, James L. Harbaugh, Jr., a captain in the United States Army, seeks to recover rental and subsistence allowances on account of a dependent mother for the period from September 1, 1936, to date of judgment.

The claim is based upon Section 4 of the Act of June 10, 1922, 42 Stat. 625, 627, which reads as follows:

> SEC. 4. That the term "dependent" as used in the succeeding sections of this Act shall include at all times and in all places a lawful wife and unmarried children under twenty-one years of age. It shall also include the mother of the officer provided she is in fact dependent upon him for her chief support.

The only point at issue is whether plaintiff's mother was, during the period of the claim, actually dependent upon him for her chief support.

Plaintiff's father, James L. Harbaugh, Sr., is 78 years of age and during the period of the claim has at all times resided with plaintiff's mother. While formerly engaged in business, he became insolvent in 1930, and since that time, except for a period of about six months during 1931 when he had part-time employment in a luggage establishment, he has been unable to obtain employment of any kind. He owns no income producing property, and because of his inability to obtain employment has contributed nothing to the support of his wife, plaintiff's mother, since 1930.

Plaintiff's mother, Minnie F. Harbaugh, is 71 years of age. She was formerly employed as secretary of the Sacramento Federation of Churches at a salary of $60.00 per month, except for the last month of such employment, when she received only $20.00. Because of illness and advancing age she resigned her position on October 1, 1936, since which time she has had no employment of any nature. She owns no real property, and her only source of income is certain stocks from which she derives two or three dollars per month.

Plaintiff's mother and father reside in Sacramento, California, in a rented house. Plaintiff's brother, Wellington Harbaugh, is employed by a San Francisco firm as a traveling salesman. His occupation requires him to be in Sacramento approximately half the time, and when there he lives with his parents.

During the period September 1, 1936 to July 1, 1939, the joint average monthly living expenses of plaintiff's mother, father and brother amounted to about $142.00, of which about $65.00 is attributable to the mother, $50.00 to the father and the remainder to the son Wellington.

Since July 1, 1939, because of the father's illness, necessitating the hiring of a full-time maid to assist the mother, and an increase in rent, these living expenses have increased to $160.00 per month. Taking into consideration the age and condition of the health of plaintiff's parents, these living expenses appear reasonable and necessary.

From September 1, 1936, to July 1, 1939, plaintiff contributed $76.00 per month to his mother, and since July 1, 1939, he has contributed $100.00 per month to her.

Throughout this period plaintiff's brother Wellington has contributed $60.00 per month to his father, such contribution to cover the portion of the living expenses attributable to Wellington when he is staying with his parents.

The only other income of the plaintiff's parents is the small amount realized from the mother's stocks and $25.00 in cash given her at Christmas, 1936, by her former employers.

This court has many times had before it the question of what constitutes the dependency of a mother under Section 4 of the Act of June 10, 1922, supra. In *Rieger* v. *United States*, 69 C. Cls. 632, 637, the court said:

> We think the words "chief support" used in this statute should be given their ordinary and well-known meaning. "Chief" support means "main" support or "principal" support. We think a mother is dependent for her "chief support" if someone else is required to furnish most, or the greater part, of the funds necessary for her reasonable support.

Except for the amount contributed by plaintiff to his mother, she would have had no means of support whatever, beyond the inconsequential amount received as dividends upon her stocks. It would be hard to find a clearer case of the dependency of the mother of an officer than is shown by this record. Under the numerous and uniform decisions of this court the plaintiff is entitled to recover the increased rental and subsistence allowances provided by law for an officer of his rank because of a dependent mother from September 1, 1936, to date of judgment herein. *Freeland* v. *United States*, 64 C. Cls. 364; *Rieger* v. *United States*, *supra*; *Bristol* v. *United States*, 76 C. Cls. 286.

Entry of judgment will await the receipt of a report from the General Accounting Office showing the amount of the allowances due the plaintiff in accordance with this opinion. It is so ordered.

MADDEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

C. R. KIRK & COMPANY v. THE UNITED STATES

[No. 44807. Decided April 7, 1941. Plaintiff's motion for new trial overruled June 2, 1941]

On the Proofs

Excise tax; sporting goods and games.—It is *held* that the device known as "Jig-Saw Blow Ball" machine is a game and as such was subject to the excise tax levied by section 609 of the Revenue Act of 1932 on sporting goods and games.

Same.—Where there was some inducement for a person to play a machine by himself but where the greatest enjoyment from its use was in competition with others, it is *held* that said machine comes within the definition of the word "game" as set forth in *White* v. *Aronson*, 302 U. S. 16.

The Reporter's statement of the case:

Mr. James A. Cosgrove for the plaintiff.

Mr. George H. Foster, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Plaintiff is an Illinois corporation, with its principal place of business in Chicago. During the period in question it manufactured and sold "Jig-Saw Blow Ball" machines, upon which the Commissioner assessed the manufacturer's excise tax levied by section 609 of the Revenue Act of 1932 (47 Stat. 169, 264). This machine is a cabinet about 74 inches high, 24 inches wide, and 15½ inches deep. The front of the cabinet is enclosed by glass. At the rear is a panel, on which is printed a map of the United States. In this panel there are 11 holes surrounded by pins and nails. Behind this panel is a motor which produces a current of air which blows a ball similar to a ping-pong ball up against the panel.

The object of the game is to shift the current of air by means of an attached control lever so as to direct the ball through the 9 "live" holes. Two of the holes are "dead", but if the ball goes through any one of the remaining 9,

a certain section of the map of the United States is illuminated. If the ball is directed through all 9 of the "live" holes, the entire map is illuminated. The player gets a certain score for each hole penetrated. A player scores poorly or well, depending upon his skill and luck. There is no inducement to play other than to test one's luck and skill, or to match one's skill and luck against a competitor.

2. The machine could be operated by only one person at a time. It was sometimes used by a single player to test his luck and skill, and it was often used by players alternately in competition against one another to see who could secure the highest score. The parties could or could not, as they chose, place wagers on the outcome.

No rules were issued governing the manner in which the machines were to be used by the persons who operated them. Plaintiff offered no prizes, awards, or inducements to encourage the use of the machines. The coin mechanism on the machines was not necessary to their operation, and was provided only for the purpose of collecting rental for the use of the machines from those who operated them. No pay-out device was provided on the machines.

In advertising the machine plaintiff represented that—

> The principal mechanisms of Blow Ball are a blower to furnish the controlled air, a scoring system set-up and the coin mechanism. This makes the game fairly simple in its mechanical construction.
>
> Jig-Saw is the Fastest Game You've Ever Seen—Yet the Skill of the Player is Important.
>
> HIGHER SCORE: Numbers in the Thousands—Just What the Player is Anxious to Have—A High Score.
>
> EASIER TO PLAY: Jig-Saw Does Not Require Tiresome Minutes of Operation But Handles Speedily and Easily.

3. Plaintiff sold the machines outright, retaining no interest therein and placing no restrictions on the use to which the machine should be put.

4. The price at which the machines were sold was fixed by taking into consideration the cost of manufacture, overhead and selling costs, and a reasonable profit, together with a consideration of what the machines could be sold for in competition, that is, what the traffic would bear for that type of machine. The price was fixed at a time when plain-

tiff was of the opinion that sales of the machine were not subject to the excise tax and the price was not changed as a result of the demand by the collector for the payment of an excise tax thereon.

In most instances the machines were billed to plaintiff's customers on an invoice which contained the statement "Federal tax paid," although the statement "Federal tax included" appeared on some invoices. The total price appearing on the invoice was the amount collected from the customer.

Beginning with the first sale of the Blow Ball machine, and continuing throughout the period involved in this suit, plaintiff maintained on its books a "Reserve for Excise Tax" account, which was set up in the following manner and can be illustrated by a typical invoice for one machine at the price of $137.50:

On its books the total of that invoice, $137.50, was charged to accounts receivable, and 1/11th of that amount was credited to the Reserve for Excise Tax, and 10/11ths to sales account.

In preparing the returns hereafter referred to, plaintiff set up as tax due 1/11th of the total net sales for the periods covered by the returns, and the same basis was used by the collector in determining plaintiff's final tax liability.

At the time the payments of excise tax which are involved in this proceeding were made, the amount paid was charged to the Reserve for Excise Tax. Due to returns of machines and other adjustments, the reserve for excise tax exceeded the amount finally determined to be due and, after final payment had been made, the balance in the reserve account was credited to surplus. The excise tax payments were made from the general funds of the company.

5. The plaintiff passed on to its customers the tax for which it sues in this case.

6. The plaintiff did not make a manufacturer's excise tax return for sales of said machine in the month of February 1938, on the ground that they were not subject to the tax, until demand was made by the deputy collector for the filing of such return. Pursuant to this demand, a return was filed on March 31, 1938, reporting a tax due of $1,092.04 on

account of sales of the Blow Ball machine. A statement attached to the return reads as follows:

> Your taxpayer does not admit that the product manufactured by it is taxable under Section 609 of the Revenue Act of 1932, inasmuch as it is not a game within the meaning thereof or as defined therein.
>
> The return is filed solely for the purpose of preventing the imposition of penalties in view of the Commissioner's previous ruling on coin-operated devices.

On the same day plaintiff filed a claim for abatement of the entire amount of tax shown on the return, together with interest of $1.82, making the total amount of the claim $1,093.86. The basis of the claim was substantially the same as that set out in the statement attached to the return.

7. On June 30, 1938, plaintiff filed a similar return for March, April, and May 1938, showing a net tax due of $428.85, and it filed a similar claim for abatement. In July 1938 a return was filed for June 1938 which showed a credit of $2.23, resulting from returns and allowances.

8. Subsequently, and on August 10, 1938, a deputy collector made an examination of plaintiff's liability for the months of March, April, May and June, and determined that for those months it owed manufacturer's excise tax on the sales of these machines in the sum of $243.31. This amount plaintiff paid on September 19, 1938, and at the same time filed a claim for refund thereof on the following ground, among others:

> The article or device manufactured by the taxpayer was not a sporting good or a game within the meaning of either Section 609, or any other definition of the word GAME as found either in the decisions of the various courts or of the various English and legal dictionaries in use today.

This claim was rejected on November 16, 1938, on the ground that the machine was a game, and on the further ground that plaintiff had not furnished satisfactory proof that it had not passed on the tax to its vendee. Likewise, the claim for abatement of the tax for February 1938 was rejected on September 22, 1938, and on October 14, 1938, the plaintiff paid the amount of the taxes and interest for

this month, $1,123.54, and filed a claim for refund thereof on the same grounds alleged in support of the claim for subsequent months. This claim was rejected on January 18, 1939.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

The first question presented in this case is whether or not the article described in the first finding is a game in the sense that word is used in section 609 of the Revenue Act of 1932 (47 Stat. 169, 264). This section levies a tax on numerous articles sold by the manufacturer, producer, or importer, of which the following groups are typical: (1) tennis rackets, baseball bats, golf clubs, lacrosse sticks, baseballs, footballs, tennis balls, and golf balls; (2) skates, snow shoes, toboggans, canoe paddles, and fishing rods and reels; and (3) billiard and pool balls, chess and checker boards, dice, and games. Then follows this catch-all phrase: "and all similar articles commonly or commercially known as sporting goods."

It will be noted that the articles listed include equipment for both indoor and outdoor sporting contests. Among the outdoor sports are tennis, baseball, football, golf, lacrosse, and polo. Among the indoor sports are billiards, chess, checkers, dice, and games. All of these involve contests; but, in addition, there is also subjected to the tax equipment for sports which do not often involve contests, such as snow shoes, canoe paddles, fishing rods and reels.

Many of the courts have said that the word "game" necessarily involves the element of contest (*Stearnes* v. *State*, 21 Tex. 692, 694; *Cheek* v. *Commonwealth*, 79 Ky. 359, 363; Bouvier's Law Dictionary "Games"); but we doubt that Congress meant to so limit it here. Snow shoes, toboggans, canoe paddles, fishing rods and reels, which Congress specifically taxed, may be used in contests, but rarely are.

The Supreme Court, however, in *White* v. *Aronson*, 302 U. S. 16, gave somewhat qualified approval to the following statement of the Circuit Court of Appeals:

> The words "games and parts of games" bring into the list of taxables only such other articles as are used in games of contest, the same as those particularly named are and with which they are closely associated.

In view of this, we shall assume that the element of contest is necessary.

The proof shows, and we have so found, that while there was some inducement for a person to play the machine in question by himself, the greatest enjoyment from its use was in competition with others, to see who could get the highest score. Except for the fact that it was adaptable to such contests, we doubt if many of the machines could have been sold.

We have no doubt that, insofar as this element is concerned, it comes within the definition of the word "game" as limited by *White* v. *Aronson*, *supra*.

The only utility of the device was recreation or amusement. It served no other useful purpose. It improved neither the mind nor the body. It had no utilitarian use.

The fact that but one player could manipulate it at a time is immaterial. Numerous articles subjected to the tax can be used by only one person at a time. A baseball bat, golf clubs, a tennis racket, a football, a billiard ball, dice, etc., can be used by only one player at a time.

We have cast about for some word to describe this device other than "game." We have been unable to think of one. It was so described by the plaintiff. The plaintiff speaks of it as "the fastest game you've ever seen."

We are of opinion that the device comes within the definition of the word "game" as used in the act.

This view makes it unnecessary for us to discuss the second question presented, which is whether or not the plaintiff passed on the tax.

It results that plaintiff's petition must be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JAMES DEB. WALBACH v. THE UNITED STATES

[No. 44979. Decided April 7, 1941]

On the Proofs

Pay and allowances; cadet reappointed to the United States Military Academy; effective date of appointment.—Where plaintiff having been originally admitted to the United States Military Academy as a cadet on June 14, 1911, and having been discharged therefrom on June 22, 1912, because of deficiency in his studies, was readmitted on August 28, 1912, in accordance with instructions received through a Congressman from the Adjutant General, in a letter dated June 25, 1912, and was given the physical examination and executed the oath as a cadet on August 28, 1912; and where the formal notice of appointment issued on September 6, 1912, stated that the plaintiff had been appointed a cadet to rank as such from the 28th day of August, 1912; and where plaintiff served as a cadet until June 12, 1916, when he was graduated; and where on June 13, 1916, plaintiff was commissioned and has since served continuously as an officer in the United States Army; it is *held* that plaintiff's appointment as a cadet effective on August 28, 1912, was a new appointment, which in no way related back to the prior appointment, and that said appointment accordingly comes within the prohibition of the Act of August 24, 1912, which provides (section 6) "That hereafter the service of a cadet who may hereafter be appointed * * * shall not be counted in computing for any purpose the length of service of any officer of the Army."

Same.—Members of Congress can only nominate candidates for appointment to the Military Academy, and have no power of appointment.

The Reporter's statement of the case:

Mr. Fred W. Shields for the plaintiff. *King & King* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. The plaintiff, James deB. Walbach, is a lieutenant colonel on the active list of the United States Army.

2. Plaintiff was admitted as a cadet to the United States Military Academy on June 14, 1911, and served as such until June 22, 1912, when he was discharged because of deficiency in studies.

3. On or about June 18, 1912, prior to his discharge from the United States Military Academy, plaintiff, upon the advice of Major General Thomas H. Barry, the then Superintendent of the Academy, communicated with his congressman and requested reappointment to the Academy. His congressman on the day following wired telling him that he would be reappointed.

4. Subsequently, the plaintiff received, through his congressman, the following letter, dated June 25, 1912, from the Adjutant General of the United States Army:

> I have the honor to inform you that the Academic Board having recommended, at its meeting on June 24, that you be reappointed a cadet at the United States Military Academy, you are authorized by the Secretary of War to report in person to the Superintendent at West Point on the 28th day of August 1912, for admission to the Military Academy, subject to a physical examination only, you having already passed the mental examination.
>
> You are requested to inform this office immediately of your acceptance or declination of the contemplated appointment. A blank form of acceptance is inclosed herewith.

5. On July 9, 1912, plaintiff filled in and signed the blank form of acceptance inclosed in said letter and returned it to the Adjutant General.

6. On August 28, 1912, plaintiff reported to the Superintendent of the United States Military Academy, as he had been directed to do, was given the physical examination, and executed the oath of office as a cadet. The formal notice of appointment or cadet warrant stating that plaintiff had been appointed a cadet of the United States Military Academy, to rank as such from the 28th day of August, 1912, was issued on September 6, 1912. He served as a cadet at the Academy until June 12, 1916, when he was graduated, and, on June 13, 1916, was commissioned a second lieutenant in the United States Army. Since the last-mentioned date he has served continuously on active duty as a commissioned officer of the United States Army, and on October 1, 1937, attained his present rank of lieutenant colonel.

7. Plaintiff was given credit for pay purposes for all his service as a cadet at the United States Military Academy and

received pay based upon such service from June 12, 1916, until about June 1929.

Since that time plaintiff has received no credit for his service as a cadet at the Academy during the period from August 28, 1912, to June 12, 1916, because the Comptroller General had, on May 25, 1929, held that plaintiff was not entitled to credit for the said service for pay purposes, which decision he affirmed on July 15, 1929.

8. Subsequently the Comptroller General determined that plaintiff had been overpaid by $1,608.33 during the period from March 1, 1925, to May 31, 1929, by reason of being credited for pay purposes with his service at the Academy from August 28, 1912, to June 12, 1916.

Plaintiff's pay was checked until he had repaid $225 of the alleged overpayment, but no further action was taken by the defendant to insure payment of his alleged indebtedness. Finally, on November 15, 1930, the General Accounting Office communicated with the Chief of Finance, United States Army, calling attention to the fact that only $225 of plaintiff's indebtedness had been collected from him and asking what steps had been taken to collect the balance of the indebtedness, and the result of such action.

On December 9, 1930, the Office of the Chief of Finance, United States Army, replied to the said letter advising that, upon the request of the War Department, there had been introduced in the Senate and House of Representatives bills which, if enacted into law, would entitle the plaintiff (and other officers named therein) to count this active service as cadets at the United States Military Academy in computing for any purpose length of service; that in view of the pending legislation no steps were being taken to collect from the plaintiff the balance of his indebtedness to the United States.

9. Congress did not enact the said bills into law, but did, in 1935, enact legislation relieving the plaintiff from repaying to defendant the amount allegedly overpaid to him from March 1, 1925, to May 31, 1929, as a result of which plaintiff was not required to repay the balance of the alleged overpayment to him, and was refunded the $225 which had been checked against his pay.

10. Plaintiff claims he is entitled to credit for his service at the United States Military Academy during the period from August 28, 1912, to June 12, 1916, and that on account of that service he is entitled to additional pay and allowances for the period from October 20, 1933, to date of judgment.

Since the filing of the petition special legislation has been enacted by the Congress and approved by the President on August 13, 1940, which provides that plaintiff and other named officers similarly situated shall thereafter be entitled to count all their service at the United States Military Academy in computing for any purpose length of service in the Army.

The period involved herein, therefore, is from October 20, 1933, to August 13, 1940.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court.

Plaintiff, a lieutenant colonel on the active list of the United States Army, brings this action to recover additional pay and allowances for the period from October 20, 1933, to date of judgment basing his claim upon the contention that he is entitled to credit for pay purposes for his service in the United States Military Academy from August 28, 1912, to June 12, 1916.

The issue involved is whether plaintiff's appointment as a cadet in the United States Military Academy was made prior to August 24, 1912.

The Act of August 24, 1912 (37 Stat. 568, 594) provides in part as follows:

> SEC. 6. That hereafter the service of a cadet who may hereafter be appointed to the United States Military Academy or to the Naval Academy shall not be counted in computing for any purpose the length of service of any officer of the Army.

Since the filing of petition herein the Congress on August 13, 1940, enacted the following private bill (Private No. 524, 76th Congress, 3d session):

> * * * That the following-named officers and former officers of the United States Army shall be entitled to

> count all their service as cadets at the United States Military Academy in computing for any purpose length of service of any officers of the Army: * * * James deB. Walbach * * *: *Provided*, That this Act shall not be construed as authorizing the payment of any back pay and allowances that may have accrued prior to the passage of this Act.

Since the foregoing act clearly establishes plaintiff's status after August 13, 1940, giving him full credit after that date for his service in the Academy, the scope of this inquiry is limited to the period prior to August 13, 1940.

Plaintiff first entered the Academy on June 14, 1911, but was discharged on June 22, 1912, because of deficiency in his studies. He entered the Academy the second time on August 28, 1912, and was graduated June 12, 1916.

The statute provides (Sec. 1325 R. S.) that no cadet discharged because of deficiency in his studies shall be returned or reappointed to the Academy except upon the recommendation of the Academic Board.

Plaintiff, on or about June 18, 1912, before he was actually discharged, and at the suggestion of the Superintendent of the Academy, made request of his member of Congress for another appointment. The member of Congress advised him that he would be reappointed, and on June 25, 1912, the Adjutant General of the Army wrote plaintiff informing him that the Academic Board had recommended that he be reappointed, and authorizing him to report at West Point on August 28, 1912, for admission to the United States Military Academy, subject only to physical examination. There was enclosed in that letter a blank form of acceptance, and plaintiff was asked to immediately inform the Adjutant General of his acceptance or declination of the *contemplated* appointment. He filled in and returned the form on July 9, 1912, indicating that he would accept the appointment.

We think that when plaintiff entered the Academy on August 28, 1912, he did so by virtue of a new and independent appointment, and one which in no way related back to the prior one.

By his discharge of June 22, 1912, plaintiff's connection with the Academy was completely severed, and the only way he could again gain admission was by another appoint-

ment. It is true that the second appointment could be made only upon the recommendation of the Academic Board, but this does not mean that the new appointment was to be considered as a mere reinstatement. The provision was designed to prevent the reappointment of a candidate who was obviously unfitted for a career in the United States Army, and who would probably have to be again discharged for some deficiency. Any appointment so made was subject to the same formalities which governed an original or first appointment. In this particular case, the plaintiff was not required to take the mental examination, having already passed that prior to his admission in 1911. It was, however, necessary for him to obtain a nomination for appointment, the permission of the War Department to take the qualifying physical examination, and to again take the prescribed oath of office as a cadet.

And it was not until after all these preliminaries had been completed that the formal notice of appointment, or cadet warrant, signed by the Secretary of War and the Adjutant General of the Army for the President, was actually issued. This warrant states on its face that plaintiff was appointed a cadet of the United States Military Academy, *to rank as such from the 28 day of August, 1912*. Nowhere in the record do we find any evidence that there was any definite appointment prior to that date. That this warrant was not issued until after the nominee had actually taken the oath of office and been admitted to the Academy was not a matter of chance. It is the regular and customary method of procedure, indicating that the appointment does not become effective until all conditions have been fulfilled. Furthermore, the communication from the Adjutant General, dated June 25, 1912, referred to a *contemplated* appointment, thus denoting that it was not an accomplished fact.

Plaintiff's contention that he was reappointed by his congressman on or about June 18, 1912, is an erroneous one. Members of Congress are not empowered to actually appoint cadets to the Military Academy. They can only nominate candidates for appointment. The statute (Sec. 1315 R. S.) specifically provides that these appointments are to be made by the President. Since the appointment in question did

not confer upon plaintiff the rank of cadet in the United States Military Academy until August 28, 1912, and since by the terms of the statute (Sec. 1317 R. S.) no pay or other allowance may be drawn until the appointee shall actually have been admitted, there is nothing upon which to base a finding that plaintiff was appointed to the Academy until after August 24, 1912. He, therefore, comes within the provisions of the Act of August 24, 1912, supra.

It follows that plaintiff's petition must be dismissed and it is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

THE SEMINOLE NATION v. THE UNITED STATES

[No. L–51. Decided January 6, 1941. Plaintiff's motion for new trial allowed, findings of fact and opinion amended May 5, 1941]

On the Proofs

Indian claims; ratification of expenditures made without authorization.—Where the full amounts due under articles VIII and IX of the treaty of 1856 were not expended for the benefit of the Seminole Indians, in accordance with the provisions of said treaty, and where under the Act of July 5, 1862, Seminole funds in excess of said amounts were expended "for the relief and support of said tribes (the Seminoles included) as have been driven from their homes and reduced to want on account of their friendship to the Government"; it is *held* that, although it may be doubtful whether the power resided in Congress to authorize the expenditure of Seminole funds for the benefit of Indians of other tribes, nevertheless such expenditures were ratified by the treaty of 1866, and plaintiff is not entitled to recover.

Same; meaning of "annuities."—The word "annuities," as used in the treaty of 1856, is not to be restricted to annual payments for *per capita* distribution to the Seminole tribe but embraces all annual payments.

Same; payments made pursuant to resolution of tribal General Council.—Where under article VIII of the treaty of August 7, 1856, providing for the payment to the Seminole Indians *per capita* of interest at 5 percent on $500,000, as annuity, such payments were not made in full for the years 1870–1874, inclusive, and where, however, in each of said years payments were made out of said fund for the benefit of

the Seminoles for purposes other than those specified in article VIII of said treaty, and where such other payments were made pursuant to resolutions of the Seminole General Council; it is *held* that the defendant is entitled to credit for said payments made pursuant to said resolution.

Same; treaty and agreement with the tribe.—The treaty of 1856, even if it was an agreement for the benefit of the individual members of the Seminole tribe, was an agreement between the United States and the tribe, and not the individuals. *The Sac and Fox Indians*, 45 C. Cls. 287; 220 U. S. 481, cited.

Same; payment made to Indian Agent.—Payment made to the United States Indian Agent in accordance with the provisions of section 11 of the Act of April 26, 1906, must be allowed as a credit to the defendant on payments authorized by article VIII of the treaty of 1856.

Same; annual payments for schools.—Where under article III of the treaty of March 21, 1866, the Government agreed to pay annually 5 percent interest on $50,000, or $2,500 annually, for "the support of schools," and where during the fiscal years 1867 to 1874, both inclusive, of the $20,000 theretofore appropriated for payment of accrued interest on said school fund, only $16,902.80 was disbursed by the defendant for educational purposes; it is *held* that the defendant is liable for the balance due, $3,097.20.

Same; payments made to tribal treasurer.—Where during the years 1875–1879, both inclusive, payments of $57,500 made to the tribal treasurer by the defendant may have been unauthorized but where it appears that the tribal treasurer disbursed annually for the maintenance of tribal schools an amount in excess of the amount the tribe was obligated to expend for schools; it is *held* that since the schools received the money the defendant is not liable.

Same.—Where the amount of $750.00 due for the year 1907 was paid to the Indian Agent under the authority of section 11 of the Act of April 26, 1906, it is *held* the plaintiff cannot recover.

Same; agency building; violation of treaty.—Where under the provisions of article VI of the treaty of March 21, 1866, the Government agreed to erect an agency building on the Seminole reservation "at an expense not exceeding ten thousand dollars"; and where an appropriation of $10,000 for erection of an agency building was made by the Act of July 28, 1866, which amount was not used and was returned to surplus; and where by the Act of May 18, 1872, the sum of $20,000 was appropriated to replace the unused appropriation of 1866 for the erection of an agency building pursuant to the Creek treaty; and where it appears that $9,030.15 of the $10,000 appropriated for the Seminole Agency was ex-

pended for some purpose; and where it appears than an agency building was in fact erected in the year 1873; and where there is no showing by the plaintiff that such agency building was not suitable; it is *held* that there was no violation of the said article VI of the treaty and plaintiff is not entitled to recover.

Same; Curtis Act.—It is *held* that although section 19 of the Curtis Act, prohibiting payments to any of the tribal governments or to any officer thereof, is applicable to the Seminole Nation, such prohibition applied only to the payment of *per capita* payments.

Same; vested rights of individuals.—It is *held* that although the Curtis Act did prohibit the making of these *per capita* payments to the tribal treasurer, and they were so made in violation of its terms; the Curtis Act did not create in the individual Indians any vested rights, it did not constitute an agreement with the tribe for the benefit of its individual members, but was merely a direction to the agents of the United States.

Same; suit for second payment of money improperly disbursed.—Where it is not disputed that the Seminole Nation received certain money, though improperly disbursed, and said money was paid to it in pursuance of a request of the General Council of the Nation, it is *held* that the Seminole Nation cannot maintain an action for the payment of said money for a second time.

Same; excess land in Seminole reservation.—Where defendant under the treaty of 1866 was obligated to provide 200,000 acres of land for the use of the Seminoles, and where the original reservation consisted of only 188,449.46 acres, or a shortage of 11,550.54 acres; and where in the adjustment of the boundary between the Seminole and Creek reservations an additional 175,000 acres were purchased at $1 per acre from the Creeks and added to the Seminole reservation; it is *held* that under the Act of August 12, 1935, the defendant is entitled to an offset of $1 per acre for the excess 165,847.17 acres, or $165,847.17.

Same; case "tried or submitted."—Where a prior decision in the instant case (82 C. Cls. 135) was reversed by the Supreme Court (299 U. S. 417) and where following such reversal an amendatory act was passed enlarging the period of limitations, and where subsequently a second amended petition was filed in accordance with the provisions of the amendatory act; it is *held* that as to all issues not finally disposed of at the former trial the instant case is not a case that had been "tried or submitted" within the meaning of the Act of August 12, 1935 (49 Stat. 571, 596).

Same; expense of allotment.—Where under the agreement with the Seminoles ratified by the Act of July 1, 1898, providing for

the allotment of tribal lands to the individual members of the tribe, there was no express provision that the United States should bear the expense of said allotment; it is *held* that an obligation to bear such expense cannot be implied. *Choctaw Nation* v. *United States*, 91 C. Cls. 320 cited.

Same; schools attended by children not members of tribe.—Where by the Act of April 21, 1904, Congress made appropriation for tribal schools and provided that such schools might be attended by children of nonmembers of the Indian tribes, and where such schools were in fact attended by white and Negro children as well as by children of the Indian tribes; said schools being maintained both by appropriations from Congress and tribal funds; it is *held* that such funds so expended not only for the benefit of the plaintiff but also for the benefit of white and Negro children cannot be charged against the plaintiff as gratuities.

Same; sums spent for plaintiff and other tribes; proportionate offset.—Under the decisions of the Court of Claims and of the Supreme Court (see *The Sisseton and Wahpeton Bands of Indians*, 42 C. Cls. 416, 429; 208 U. S. 561, 567), it is *held* that the defendant is entitled to an offset against the claims of plaintiff of a proportionate amount of the sums spent for the joint benefit of the Seminole and other tribes of Indians.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Mr. W. W. Pryor* was on the brief.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. By an act of Congress approved May 20, 1924 (43 Stat. 133), it is provided:

> That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

SEC. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

SEC. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

SEC. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

SEC. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this act: *Provided*, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

SEC. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

> SEC. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

This act was modified by joint resolution of May 19, 1926 (44 Stat. 568), permitting plaintiff to bring separate suits on one or more causes of action, and by the act of Congress approved February 19, 1929 (45 Stat. 1229) the time for filing such suits was extended to June 30, 1930.

Under the provisions of said act the original petition herein was filed cn February 24, 1930, and an amended petition was filed on September 19, 1934.

2. Subsequent to the decision of the Supreme Court on January 14, 1931, in *United States* v. *Seminole Nation*, 299 U. S. 417, holding that there could be no recovery for items included for the first time in an amended petition filed after the expiration of the statute of limitations, Congress passed an act, approved August 16, 1937 (50 Stat. 650), which provided:

> That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts * * * plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits.

Under the terms of said act this case was reinstated on September 30, 1937. A second amended petition was filed on November 8, 1937.

3. Under the terms of article VIII of the treaty of August 7. 1856 (11 Stat. 699, 702), between the United States and the Creek and Seminole Tribes of Indians, the United States agreed in respect of the Seminoles, among other things:

> * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, * * *

said sums to be applied to said objects in such manner as the President should direct.

For each fiscal year during the ten-year period from 1858 to 1867, inclusive, Congress annually appropriated as provided by article VIII of the said treaty the following amounts: $3,000 for support of schools; $2,000 for agricultural assistance; and $2,200 for the support of smiths and smith shops, or a total of $72,000, the amount due the Seminoles under these provisions of the treaty.

While the said amounts were duly appropriated by Congress and made available for the purposes named, only $10,436.58 of the amounts so appropriated was disbursed in payment of the above treaty obligations. The balance of $61,563.42 was disbursed by the United States prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians who had been driven from their homes during the Civil War on account of their friendship for the government.

4. Under the provisions of article IX of said treaty of August 7, 1856, the United States agreed to expend for the Seminoles then in Florida, after they had all removed to the Seminole country west, the sum of twenty thousand dollars in improvements. Accordingly, in March 1857 Congress appropriated $20,000 to be expended for improvements for the Seminoles in Florida after they had removed to the Seminole country west. After a number of them had been so removed, there was disbursed from this appropriation for improvements the sum of $18,210.00.

5. Under the provisions of said article VIII of the treaty of 1856 the United States further agreed in respect of the Seminoles:

> * * * to invest for them the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *.

After the passage of the act of July 26, 1866 (14 Stat. 263, 264), Congress annually appropriated for each fiscal year from 1867 to 1909, both inclusive, the sum of $25,000 as provided for in the above article.

During each year through and including the year 1906 the United States disbursed the sums thus appropriated either by making direct *per capita* payments to members of the tribe or by cash payments to the treasurer of the Seminole Nation, except for the following years when the amount so disbursed was as follows:

Year	Payment	Deficit	Overpayment
1867	$12,500.00	$12,500.00	
1868	24,550.00	450.00	
1869	24,999.75	.25	
1870	19,679.00	5,321.00	
1871	12,500.00	12,500.00	
1872	12,374.55	12,625.45	
1873	12,401.00	12,599.00	
1874	13,898.42	11,101.58	
1875	25,082.25		82.25
1876	500.00	24,500.00	
1877	36,381.00		11,381.00
1879	24,546.00	454.00	
1880	25,454.00		454.00
1882	25,028.00		28.00
1883	25,182.29		182.29
1907	12,500.00	12,500.00	

The excess of the foregoing deficits over the overpayments is $92,423.74.

In the following years the United States disbursed the following amounts of said appropriations for the benefit of the Seminole Nation, but for purposes other than that

specified in said article. These payments were made pursuant to resolutions of the Seminole General Council:

Year:	Amount
1870	$17,8[illegible].00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

In the years 1907 to 1909, both inclusive, the following amounts of said appropriations were paid to the United States Indian Agent:

Year:	Amount
1907	$12,500.00
1908	23,000.00
1909	25,000.00

6. By article III of the treaty of March 21, 1866 (14 Stat. 755), it was, among other things, provided:

> * * * seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *.

Appropriations were made for the payment of interest on the funds named in the above treaty provision for each fiscal year from 1867 to 1909, inclusive.

During the fiscal years 1867 to 1874, both inclusive, of the $20,000 theretofore appropriated in payment of accrued interest on the $50,000 permanent school fund, $16,902.80 was disbursed by defendant for educational purposes. During the years 1875 to 1907, both inclusive, defendant paid into the Seminole national treasury the entire amount appropriated for interest on the $50,000 school fund and on the $20,000 for the support of the Seminole Government. During said period the Seminole Nation disbursed from its treasury not less than the sum of $7,500 per annum for the maintenance of its schools.

7. Article VI of said treaty of March 21, 1866, provides:

> Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand $10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be *directed* [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

By act of July 28, 1866 (14 Stat. 319), Congress appropriated $10,000 for the purpose of erecting agency buildings as provided for in said article. This money was not used and was thereafter returned to surplus. By act of May 18, 1872 (17 Stat. 132), another appropriation was made to take the place of the amount so returned to surplus. $9,030.15 of this amount was used for some purpose, but for what purpose the record does not reveal. However, an agency building was erected on the Seminole reservation in the year 1873.

In the years 1870 and 1872 the amount of $931.76 was expended from general appropriations for agency buildings and repairs.

8. During the fiscal years 1899 to 1907, both inclusive, the defendant made payment to the tribal treasurer of various moneys due the Seminole Nation in the total sum of $864,702.58. Of this total amount, $212,500 was interest on the two trust funds of $250,000 each set up under article VIII of the treaty of 1856; $29,750 thereof was interest on the trust funds of $50,000 and $20,000 under article III of the treaty of 1866; $622,156.87 thereof was interest on the fund of $1,500,000 set up under the act of March 2, 1889 (25 Stat. 980, 1004); and $295.71 was "Indian moneys, proceeds of labor."

These moneys were paid to the tribal treasurer at the request of the council of the plaintiff, but over the protest of some of the individual members of the tribe. They were all expended by the tribal officers, except the sum of

$1,128.88, which was paid to the defendant's representative after the disbursement of all funds had been taken away from the tribal officers by the act of April 26, 1906 (34 Stat. 137).

The books of the tribal treasurer showing the receipt and expenditure of these moneys are crude, and no proof was introduced as to their accuracy, but such as they are they tend to show that $815,059.71 of these moneys were expended by the tribal officials in the years 1899 to 1906, both inclusive, for the following purposes and in the following amounts:

Tribal officers	$152, 900. 00
Emahaha Mission School	79, 000. 00
Mekusukey Mission School	79, 000. 00
Day Schools	16, 000. 00
School expense	8, 000. 00
Blacksmith	24, 000. 00
National physician	27, 000. 00
Per capita payments	341, 516. 67
Interest	10, 533. 33
Contingencies	12, 000. 00
Surplus	29, 409. 71
Attorney's fees	27, 000. 00
Church	4, 200. 00
Spring payments	4, 500. 00

9. Under article III of the Treaty of 1866 it was agreed that $40,362 of the consideration due the Seminole Nation for the cession of lands to the United States should be used for subsisting the Seminole Indians. That amount was disbursed for that purpose during the fiscal year 1867. By act of July 27, 1868 (15 Stat. 199, 214) Congress appropriated $31,083.79 for the following purpose:

> To supply a deficiency in appropriation for subsisting Seminole Indians, thirty-one thousand and eighty-three dollars and seventy-nine cents; which amount shall be deducted from any money or funds belonging to said tribe of Indians.

The sum so appropriated was used by defendant during the fiscal year 1869 for the purchase of provisions for the Seminole Indians, but no deduction from plaintiff's funds has been made on that account as required by said act.

10. In undertaking to locate the Seminole Indians on the 200,000 acres provided for them by the treaty of 1866 prior

to a survey, an error was made with respect to the location of the eastern boundary of the tract as described in the treaty, as a result of which the Seminoles were placed in possession of lands owned by the Creeks which were located east of and adjoining the tract of 200,000 acres. Upon these lands improvements were placed by the Seminoles before the error was discovered. By act of March 3, 1873 (17 Stat. 626), the Secretary of the Interior was authorized to negotiate with the Creeks for the relinquishment to the United States of such parts of their country as may have been so occupied by the Seminoles. Thereafter the Creek Nation, for a consideration of $175,000, ceded to the United States 175,000 acres of its lands located east of and adjoining the 200,000 acres set aside for the Seminoles under the treaty of 1866. In 1888 a survey was made for the purpose of establishing the eastern boundary of the tract of 175,000 acres, but by reason of error in the survey the area inclosed was 177,397.71 acres, for which the Creeks were paid $177,397.71. This became a part of the Seminole reservation, in addition to the 200,000 acres, more or less, and was disposed of either by allotment to members of the tribe or by sale for the account of the tribe.

11. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866, the United States expended for the benefit of the Seminole Nation the sum of $42,861.54 for the following purposes:

Purpose	Gratuity Rept., G. A. O. pages	Amount
Agency buildings and repairs	27	$5,200.00
Clothing	142, 143	610.00
Education	38, 39	2,500.00
Expenses of delegates	127, 141	5,155.70
Fuel, light, and water	52, 53	98.50
Miscellaneous agency expenses	52, 53, 142	1,239.50
Pay of Indian Agents	125, 163	15,475.05
Pay of Interpreters	52, 124	3,910.00
Pay of miscellaneous employees	52, 141	158.50
Presents	127	168.80
Provisions and other rations	141, 142, 163	4,657.57
Transportation, etc., of supplies	52, 53	3,687.92
Total		42,861.54

Of the foregoing items the amounts spent for the following were spent gratuitously: clothing, education, presents, provisions and other rations, fuel, light and water, miscellaneous agency expenses, pay of Indian agents, pay of interpreters,

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pay of miscellaneous employees, and transportation, etc., of supplies.

12. During the period beginning with the fiscal year 1867 and ending with the fiscal year 1898, the United States expended gratuitously for the benefit of the Seminole Nation the sum of $27,720.90 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Education	37, 54, 55	$171.89
Expenses of delegations	40, 143	4,309.00
Feed and care of livestock	53, 54, 55, 67	345.00
Fuel, light, and water	54, 56, 67	68.50
Medical attention	55, 177	425.68
Miscellaneous agency expenses	27, 40, 53-57	6,749.94
Pay of Indian Agents	40, 55, 125	10,410.77
Pay of interpreters	57, 124	3,384.50
Pay of miscellaneous employees	54-56	180.00
Provisions and other rations	67, 143	659.12
Transportation, etc., of supplies	40, 53, 54	1,016.50
Total		27,720.90

13. During the period beginning with the fiscal year 1899 and ending with the fiscal year 1934, the United States expended for the benefit of the Seminole Nation the sum of $32,309.21 for the following purposes, all of which, except $20,377.89 for education, was spent gratuitously (as amended[1] May 5, 1941):

Purpose	Gratuity Rept. G. A. O. pages	Amount
Appraising	43, 47, 48	$3,474.93
Clothing	167-168	5.42
Enrolling	42, 45, 46, 48	432.96
Education	96, 97, 98, 104, 105, 107, 109, 144-151, 152-154, 173, 174.	20,377.89
Expenses of delegates	153	149.90
General office expenses	14, 16, 43, 45, 47	2,539.40
Livestock	167	35.00
Medical attention	51, 152	1,124.12
Miscellaneous agency expenses	64, 164, 165	109.69
Pay miscellaneous employees	167	10.00
Per capita payment expenses	14, 16, 78	507.96
Preservation of records	128	40.15
Probate expenses	129, 136	2.00
Protecting property interests	137, 138	17.50
Provisions and other rations	168	216.00
Sale of townsites	18, 20	1.65
Surveying	43, 45, 48	501.95
Surveying and allotting	25	2,663.24
Traveling expenses	76, 77	99.45
Total		32,309.21

14. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866, the United States expended gratuitously for the benefit of the Seminole and

[1] See opinion on motion for new trial, *infra*.

Creek Nations of Indians the sum of $1,852.75 for the follow-following purposes:

Purpose	Gratuity Rept. G. A. O., page	Amount
Miscellaneous agency expenses	52	$370.75
Pay of miscellaneous employees	52	1,027.00
Transportation, etc., of supplies	52	455.00
Total		1,852.75

15. During the period from the beginning of the fiscal year 1867 and ending with the fiscal year 1898, the United States expended gratuitously for the benefit of the Seminole and Creek Nations of Indians the sum of $1,572.16 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Annuity expenses	53	$1,316.66
Miscellaneous Agency expenses	54, 57	230.50
Pay of Interpreters	124	25.00
Total		1,572.16

16. During the fiscal years 1857 to 1934 the Seminole Tribe of Indians composed, approximately, 15 per cent of the total population of the Creek and Seminole Tribes, but what portion of the expenditures set out in findings 14 and 15 was made for the benefit of the Creeks and what portion for the benefit of the Seminoles does not appear.

17. During the period from the beginning of the fiscal year 1867 to the end of the fiscal year 1898, the United States expended gratuitously for the benefit of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations of Indians the sum of $305,292.80 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural implements and equipment	56, 58, 59, 68	$152.20
Feed and care of livestock	56–59, 67	1,396.28
Fuel, light, and water	56–64, 67	791.50
General office expense	41–42	135,219.60
Hardware, glass, oils and paints	56, 59	11.24
Livestock	56, 58, 59	547.50
Medical attention	56–59	161.65
Miscellaneous agency expenses	56–64, 172	4,139.91
Pay and expenses of farmers	59	226.67
Pay and expenses of Indian police	58, 59, 63, 68, 123, 169	80,983.17
Pay of Indian agents	121, 125	37,389.53
Pay of miscellaneous employees	56–64, 73	43,857.75
Pay of skilled employees	56–59, 68	415.80
Total		305,292.80

18. During the period from the beginning of the fiscal year 1899 to the end of the fiscal year 1934 the United States expended gratuitously for the benefit of the Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations of Indians the sum of $11,416,066.55 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural aid	23, 24, 166, 167, 168	$24,331.81
Allotting	16, 17, 20	36.65
Appraising	44-47, 49	18,665.01
Appraising and selling lands	14-20	205,959.07
Appraisal and sale of restricted lands	26	24,999.20
Automobiles and repairs	22-24, 51, 70, 166-167, 180	23,799.99
Construction and maintenance of Claremore Hospital.	50-51, 84, 92, 150-151	77,127.98
Copying allotment records	69	14,648.72
Education	28-36, 50-51, 83, 85-105, 106-114, 144-154, 167-168.	2,179,846.86
Equalization of allotments, expenses	14, 16, 20, 47, 49	207.88
Examining records in disputed citizenship cases.	44, 45, 49	26,105.59
Feed and care of horses	74-80, 139	3,371.96
Fuel, light, and water	64, 71	108.20
General office expenses	14, 16-20, 42-49	4,218,065.39
Household equipment	166-168	2,625.33
Incidental expenses	66-74, 80, 139-140	30,115.98
Investigating leases	116, 117	29,955.95
Leasing of mineral and other land	14, 16, 20, 42, 49	4,514.39
Livestock	68, 167, 168	1,290.00
Medical attention	51, 152, 154, 170, 177	976.41
Miscellaneous agency expenses	22-24, 51, 64-68, 70-72, 164-174.	215,416.02
Oil and gas expense	16, 17, 19, 20	7,028.28
Oil and gas mining supervision, allotted lands	118, 119	85,703.40
Pay and expenses of farmers	23, 24, 81-83, 115	327,566.96
Pay and expenses of field matrons	81-83	6,217.32
Pay and expenses of Indian police	71, 72, 81-83, 123	174,860.56
Pay of Indian agents	121	30,250.00
Pay of clerks	120	4,721.62
Pay of Indian inspectors	79, 80, 122	22,381.97
Pay of interpreters	81-83, 164-168	125,783.64
Pay of miscellaneous employees	23, 51, 64, 67, 71, 72, 74-83, 120, 139-140, 164-168.	1,717,185.80
Pay of superintendents	126, 167, 168	11,220.25
Per capita payment expenses	15, 66, 67	141.68
Preservation of records	128	8,886.62
Probate expense	72, 81-83, 121-136, 166, 168	1,053,120.71
Protecting property interests	137-138	386,847.59
Protecting property interests of restricted members.	15-16	4,741.70
Provisions and other rations	167-168	139.27
Purchase of horses	77, 139	720.00
Removal of alienation restrictions	159-161	88,346.12
Sale of allotted lands	15	265.12
Sale of restricted lands	15	1,577.09
Sale of town lots	15, 17, 18, 47, 49, 79, 80	250.44
Sale of town sites	47, 49	416.71
Sale of unallotted lands	15, 162	53,538.80
Surveying	15, 17, 18, 44-47	49,695.31
Surveying and allotting	25	7,331.24
Surveying segregated coal and asphalt lands	16, 21	6.76
Surveying, sale, etc., of lands	71, 164-168	80,809.05
Timber estimating	15, 44	33,776.10
Transportation, etc., of supplies	56, 57, 60, 61, 64, 65, 71, 144-150, 166, 167, 174, 175.	7,966.50
Traveling expenses	66, 74, 80, 139, 140, 176	22,401.55
Total		11,416,066.55

19. During the period from 1861 to 1897 the Seminole tribe of Indians composed approximately 4.38 per cent of the total population of the Cherokee, Creek, Chickasaw, Choctaw, and Seminole Nations, and from 1908 to 1928 it composed about 3.08 per cent thereof, and during the entire period from 1861 to 1928 it composed 3.72 per cent thereof; but what portion of the expenditures set out in findings 17 and 18 were spent for the benefit of the Seminole Nation does not appear by the proof.

The court decided on January 6, 1941, that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

This case was formerly before this court on plaintiff's original and amended petitions. Judgment was entered in favor of the plaintiff for $1,317,087.27 (82 Ct. Cls. 135). We were reversed in part by the Supreme Court (299 U. S. 417) principally on the ground that the judgment embraced items set up for the first time in an amended petition which was filed after the expiration of the statutory period within which suit could be brought. Upon remand of the case here, judgment was entered in favor of the plaintiff for $10,099.25.

Following this, on August 16, 1937, Congress passed the act set out in finding 2 giving plaintiff the right to amend its petition to conform to the evidence taken and conferring jurisdiction on this court to render judgment on the items set up for the first time in such amended petition. In pursuance thereto a second amended petition was filed on November 8, 1937.

Claims asserted in paragraph III of plaintiff's second amended petition (Findings 3 and 4)

In this paragraph plaintiff asserts a claim under a portion of article VIII of the treaty of August 7, 1856 (11 Stat. 699, 702), and under a portion of article IX of said treaty. The total amount of the claim asserted is $63,353.42. The amount of $61,563.42 thereof arises under that provision of article VIII of the treaty of 1856 which reads as follows:

> * * * the United States do therefore agree and stipulate as follows, viz: * * * to provide annually for

> ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them.

The balance of $1,790 arises under that portion of article IX of the treaty set out in finding 4, under which the defendant agreed to spend the sum of $20,000 in improvements after all the Florida Seminoles had removed to the "Seminole country west."

As set out in finding 3, the defendant has spent only $10,436.58 of the total of $72,000 due under said part of article VIII, leaving a balance due the plaintiff of $61,563.42. Of the $20,000 agreed to be spent for improvements, the defendant expended the total amount of $18,210, leaving a balance of $1,790, or a total due on the claim asserted in paragraph III of the petition of $63,353.42. Judgment for this amount was rendered on the former trial, but the Supreme Court reversed as to both of these items (299 U. S. 424, 425) because they had been included for the first time in the amended petition filed after the expiration of the statute of limitations.

The amount of $63,353.42 has not been expended by the defendant for the purposes set forth in the two above articles of the treaty. However, the act of July 5, 1862 (12 Stat. 512, 528), authorized the President to expend Seminole funds "for the relief and support of such individual members of said tribes" (the Seminoles among the number) "as have been driven from their homes and reduced to want on account of their friendship to the government." A total of $249,731.88 thereof has been spent for the relief of refugee Indians. Of this amount $31,599.68 was spent for the benefit of refugee Seminole Indians (pp. 28, 29, G. A. O. report, filed September 6, 1934). The expenditure of so much thereof was authorized by said act. It may be doubted that power resided in the Congress to authorize the expenditure of Seminole funds for the benefit of Indians of other tribes, but article VIII of the treaty of March 21, 1866 (14 Stat. 755, 759), provides:

> The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for * * * all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians

> since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States.

It will be noted that the ratification of the expenditures for this purpose relates not only to expenditures for destitute Seminole Indians, but to destitute Indians in general. Irrespective, therefore, of whether or not the expenditures were authorized when made, they were ratified by this treaty. This treaty further provided that the amounts to be paid under it were in full settlement for the expenditures from their funds for destitute Indians.

In our former opinion in this case we held that the ratification by the treaty of 1866 related to expenditures of annuity funds only. We reaffirm this holding, but we are of the opinion that the amounts stipulated for in the quoted portion of article VIII of the treaty of 1856 were annuities; that is to say, annual payments. We do not think that the word "annuities" is to be restricted to annual payments for *per capita* distribution to the tribe, but embraces all annual payments.

The amount expended for the relief of destitute Indians being in excess of the defendant's obligation under the quoted provision of article VIII of the treaty of 1856, it results that the plaintiff is not entitled to recover on this item.

As to the item of $1,790: The defendant obligated itself to expend the $20,000 in improvements only "after they shall all remove" from Florida to the country west. The proof shows that of the 500 Seminoles in Florida, but 164 of them removed to the country west. Although the condition of the obligation was never met, the defendant spent $18,210 of the total of $20,000. This we think more than discharged its obligation, legal or moral, under this article of the treaty, and that, therefore, the plaintiff is not entitled to recover the item of $1,790. (Amended.)[1]

[1] See opinion on motion for new trial, *infra*.

It results that the plaintiff is not entitled to recover any amount on account of the claim set forth in paragraph III of plaintiff's second amended petition.

Claim asserted in paragraph IV of plaintiff's second amended petition (Finding 5)

In this paragraph plaintiff asserts a claim under another portion of article VIII of the treaty of August 7, 1856 (11 Stat. 699, 702) which is set out in finding 5, and which, in substance, provides for the payment to the Seminoles *per capita* of interest at 5 per cent on $500,000. The plaintiff alleges that the defendant has either illegally disbursed or failed to disburse $154,551.28 of the amount due under this portion of this article of the treaty.

On the former trial of this case the court entered judgment on this item for $154,551.28. The Supreme Court reversed on two grounds: first, because a part of the amount claimed was due for a period not within that covered by the original petition; and, second, because the findings did not show that any portion of the fund had been illegally disbursed. Since the original petition was not grounded upon the failure to disburse, but only upon illegal disbursements, the Supreme Court held that there could be no recovery under the findings. The second amended petition, on the other hand, prays recovery both for illegal disbursements and for a failure to disburse.

In finding 5 there is set forth a statement of the years in which there was a deficit or an overpayment of the amount of this interest. It appears that the excess of the deficits over the overpayments is $92,423.74.

The table shows deficits for the years 1870–1874, both inclusive. In each of these years, however, payments were made out of this fund for purposes other than those specified in article VIII of the treaty in the amounts set out in the finding. These payments were made pursuant to resolutions of the Seminole General Council. The defendant claims credit for these amounts totalling $66,422.64.

Article VIII of the treaty of 1856 provided that these payments should be made *per capita* for the benefit of each

individual Indian, but whether or not it was an agreement for the benefit of each individual Indian, it was an agreement between the United States and the tribe and not the individuals. *The Sac and Fox Indians*, 220 U. S. 481. So that we are presented with a case where one of the contracting parties says to the other, I wish you would pay me this money so I can use it for another purpose I have in mind; if you will do so, I agree to relieve you of your obligation to make the *per capita* payments. If the other contracting party agrees and pays the money as requested, certainly the other party cannot later hold him liable for doing so.

In the year 1907, $12,500 was paid to the United States Indian Agent. This payment was authorized by section 11 of the act of April 26, 1906 (34 Stat. 137, 141), which provides, in part:

> That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; * * *.

The $92,423.74 must be credited, therefore, with the sum of $78,922.64, leaving a balance due plaintiff under this portion of article VIII of the treaty of $13,501.10.

Claim asserted in paragraph V of plaintiff's second amended petition (Finding 6)

In this paragraph plaintiff asserts a claim for $90,597.20 under that portion of article III of the treaty of March 21, 1866, (14 Stat. 755) in which the defendant agreed to pay annually 5 per cent interest on $50,000, or $2,500, for "the support of schools." In plaintiff's requested finding 8 the amount of this claim is reduced to $61,347.20. In our former opinion (82 Ct. Cls. 135, 151–152) we held that payments made to the tribal treasury during the years 1875–1879, both inclusive, were unauthorized, and we gave judgment therefor in the amount of $57,500, and also for underpayments for the years 1867–1874, both inclusive, amounting to

$3,097.20, and for an underpayment of $750 for the year 1907, amounting in all to the sum of $61,347.20. The Supreme Court reversed because the claims asserted were not within the statutory period, and because the original petition, as amended, was grounded only on a misapplication of the funds, and not on a mere failure to pay.

Even though the payments to the tribal treasurer during the years 1875–1879 may have been unauthorized, it appears that the tribal treasurer disbursed annually not less than $2,500 in excess of amounts it was otherwise obligated to expend for the maintenance of its schools.[1] Since the schools actually got the money, it makes no difference that the payments were made through the agency of the tribal officials. The defendant would be liable, if at all, only if it appeared that the payments were not in fact made.

The $750.00, which it is alleged was not paid for the year 1907, was paid to the Indian Agent under the authority of section 11 of the act of April 26, 1906 (34 Stat. 137), heretofore quoted.

However, the plaintiff is entitled to recover the underpayments during the fiscal years 1867–1874, both inclusive, in the amount of $3,097.20.

Claim asserted under paragraph VI of plaintiff's second amended petition (Finding 7)

In this paragraph plaintiff asserts a claim for $10,000 under the provisions of article VI of the treaty of March 21, 1866 (14 Stat. 755), under the terms of which the United States agreed that it would erect an agency building on the Seminole reservation "at an expense not exceeding ten thousand ($10,000) dollars."

In the original opinion in this case it was held that the plaintiff was entitled to recover $9,068.24, being the balance of $10,000 after the deduction of $931.76 shown to have been spent for "agency buildings and repairs." The Su-

[1] Annual Reports of Commissioner of Indian Affairs: 1876, pp. 212–213; 1877, pp. 690–691; 1878, pp. 286–287; 1879, pp. 341–342; 1881, pp. 280–281; 1883, pp. 90, 250–251; 1844, pp. 270–271; 1886, pp. 146, 154; 1887, pp. 98, 110; 1888, pp. 113, 122; 1890, pp. 89, 94; 1891, pp. 240, 250; 1892, pp. 247, 256; 1893, pp. 143, 147; 1894, p. 140; 1895, pp. 155, 161; 1896, pp. 151–158.

preme Court reversed as to this item because not within the period alleged in the original petition. The plaintiff in its present brief admits that it is entitled to recover under this item no more than $9,068.24.

Congress by the act of July 28, 1866 (14 Stat. 319), appropriated the sum of $10,000 for this purpose, but this amount was not used and was returned to surplus. By the act of May 18, 1872 (17 Stat. 132), the sum of $20,000 was appropriated to replace the appropriation of 1866 returned to surplus and for the erection of an agency building pursuant to the Creek treaty. It appears from the report of the General Accounting Office, filed herein on September 6, 1934, pages 20, 25, and 27, that $9,030.15 of the $10,000 appropriated for the Seminole Agency was expended for some purpose, since on July 31, 1875, $969.85 of that part of the appropriation due the Seminoles was returned to surplus; but it does not appear for what purpose it was used. However, it appears from the report of the Commissioner of Indian Affairs for 1873, pages 211 and 212, that an agency building was erected on the Seminole reservation in that year. Whether or not the $9,030.15 was used for this purpose, it nevertheless appears that an agency building was erected and there is no showing by the plaintiff that it was not suitable. Article VI of the treaty of March 21, 1866, provided merely for the erection of "suitable agency buildings" "at an expense *not exceeding* ten thousand ($10,000) dollars." [Italics ours.] It appears that agency buildings have been erected and there is no showing that they were not suitable. Therefore, there has been no violation of this article of the treaty.

Claim asserted under paragraph VII of plaintiff's second amended petition (Finding 8)

In this paragraph the plaintiff asserts a claim for all moneys paid to its tribal treasurer after the passage of the Curtis Act of June 28, 1898 (30 Stat. 495). The total amount of these payments was $864,702.58. Of this amount $212,500 was paid to fulfill the obligation of article VIII of the treaty of 1856 providing for *per capita* payments of

$25,000 per annum; $29,750 of it was to fulfill the obligation of article III of the treaty of 1866 providing for the payment of interest at 5 per cent on $50,000 for school purposes, and 5 per cent interest on $20,000 for the support of the Seminole government; $622,156.87 of it was to fulfill the obligations of section 12 of the act of March 2, 1889 (25 Stat. 980, 1004), which provided for the payment of interest at 5 per cent per annum on $1,500,000 "to be paid semiannually to the treasurer of said nation." The remainder of $295.71 is "proceeds of labor."

Plaintiff says that the payment of these moneys to the tribal treasurer was prohibited by section 19 of the Curtis Act (30 Stat. 495), which reads as follows:

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; *and per capita payments shall be made direct to each individual in lawful money of the United States*, and the same shall not be liable to the payment of any previously contracted obligation. [Italics ours.]

Defendant replies that this section was not intended to apply to any moneys except those required to be distributed *per capita* among members of the tribe; and, further, that although unlawfully made, the plaintiff is estopped to complain thereof; and, thirdly, that if unlawfully made, the defendant is entitled to a credit for the payments as gratuities.

On the former trial of this case this court held that all the payments to the tribal treasurer were prohibited by section 19 of the Curtis Act, which section we held applied to the Seminole Nation, and that the plaintiff was entitled to judgment for the entire amount. The Supreme Court reversed, first, on the ground that the original petition was based upon the defendant's alleged refusal to make payments to the tribal treasurer; and, second, that the amended petition, which for the first time complained of the payment of these sums to the tribal treasurer, was filed after the expiration of the statutory period.

We reaffirm our former opinion in this case to the effect that section 19 was intended to apply to the plaintiff. The Secretary of the Interior in making the payments to the tribal treasurer was acting under the authority of an opinion of the Assistant Comptroller of the Treasury. In that opinion the Comptroller held that the Seminole agreement ratified July 1, 1898 (30 Stat. 567), providing as it did for the continuation of existing treaties between the Seminoles and the United States, made section 19 of the Curtis Act inapplicable to the Seminole Nation. He was of the opinion that under these treaties the Secretary of the Interior was authorized to pay funds due the tribe into the tribal treasury; but, as we held in our former opinion, the authority to pay these funds to the tribal treasurer was derived not from a treaty, but from the act of April 15, 1874 (18 Stat. 29), which authorized such a disbursement, provided the Council of the tribe agreed thereto. We do not think that the Seminole agreement providing for the continuation of existing *treaties* had in contemplation an agreement entered into under this Act. It is hardly conceivable that on June 28, 1898, Congress should have passed an Act prohibiting the making of certain payments to the tribal treasurers of all the Five Civilized Tribes, which included the Seminole Nation, and three days later should have passed an Act repealing this provision as to the Seminoles. We are of opinion that the prohibition of the Curtis Act applied to the Seminoles.

However, on further consideration, we think the prohibition of section 19 of the Curtis Act had application only to *per capita* payments. In the first clause of that section it is provided—

> That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement; * * *

but the meaning of this clause is modified by the following one, which reads:

> * * * but payments of all sums *to members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him; * * * [Italics ours.]

The succeeding clause directs how these officers shall make these payments to members of the tribes. It provides:

> * * * and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word "but" in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe.

The tribal government in the Seminole Nation was continued after the passage of the Curtis Act, and the former restriction on the enactments of the General Council of the tribe requiring their approval by the President of the United States was removed by the Seminole agreement. The removal of this restriction is inconsistent with a purpose to deprive them of their right to collect moneys due the tribe.

Moreover, as the defendant points out in its brief, the Curtis Act, as originally drawn, directed that not only payments of sums to members of the tribe should be made by an officer appointed by the Secretary of the Interior, but also provided that "payments of all expenses incurred in transacting their business" should be so made. When the Act was finally passed, this clause relating to the payment of expenses incurred in transacting their business was eliminated.

We conclude, therefore, that while section 19 of the Curtis Act is applicable to the Seminole Nation, it prohibited the payment to the tribal treasurer of *per capita* payments only. *Choctaw Nation* v. *United States*, 91 C. Cls. 320. These payments amounted to the sum of $212,500.

But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested

rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. *The Sac and Fox Indians, supra.*

It is not disputed that the tribe got the money. It was paid to it in pursuance of a request of its General Council. Plainly, therefore, the Nation cannot maintain an action for the payment of it a second time. It is only the Nation which is authorized to sue by the jurisdictional act.

It results that the plaintiff is not entitled to recover on this item.

DEFENDANT'S COUNTERCLAIMS

1. *Defendant's claim for an offset as set out in Finding 9*

By the act of July 27, 1868 (15 Stat. 199, 214), Congress appropriated $31,083.79 for subsisting the Seminole Indians, and provided that that amount should be deducted from any funds belonging to them. This amount was expended, but has not been deducted from the funds due them. The plaintiff admits that the defendant is entitled to this offset. We agree.

2. *Defendant's claim for an amount of lands deeded plaintiff in addition to the tract provided for by the treaty of 1866 (Finding 10)*

Under the treaty of 1866 the defendant undertook to provide 200,000 acres of land for the use of the Seminoles. The east boundary of this tract was to be the west boundary of the Creek reservation. The plaintiff, however, was erroneously located partly on the Creek reservation. When this error was discovered the defendant purchased from the Creek nation 175,000 acres of its lands located east of and adjoining the Seminole reservation, for a consideration of $175,000. The eastern boundary of this tract, however, was run so as to include not 175,000 acres, but 177,397.71 acres.

When the west boundary was located it developed that the total number of acres in the reservation, exclusive of the 177,397.71 acres above referred to, was 188,449.46 acres, or 11,550.54 less than the 200,000 acres which the defendant was

obligated to furnish under the treaty of 1866. The defendant claims an offset of the difference between the 177,397.71 acres and the 11,550.54 acres at $1.00 per acre.

The defendant was obligated by treaty to purchase only 200,000 acres of land and therefore under the act of August 12, 1935 (49 Stat. 571, 596) it is entitled to an offset for the additional acreage purchased. This was 165,847.17 acres, the purchase price of which was $165,847.17. The defendant is entitled to an offset of this amount under the above-mentioned act, section 2 of which directs this court—

> * * * to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band.

3. *Defendant's claim of gratuity payments as set out in Finding 11*

The defendant claims that from 1857 to 1866, both inclusive, it expended gratuitously for the benefit of the Seminole Nation the sum of $42,861.54 for various purposes, as set out in Finding 11.

In defense the plaintiff insists, first, that the Act of August 12, 1935, has application only to cases that had not been tried or submitted, and that this case had been tried or submitted prior to the passage of that Act. We think there is no merit in this contention. It had been tried and submitted in this court, but the Supreme Court reversed principally because many of the claims were first asserted after the expiration of the statutory period within which suit could be brought. After an amendatory act was passed enlarging the period of limitations, a second amended petition was filed setting up these claims. It seems manifest that as to all issues not finally disposed of at the former trial this is not a case that had been tried or submitted.

Secondly, the plaintiff says that many of the expenditures set out in finding 11 were required by treaty. If this be true, of course the defendant is not entitled to the offset.

The first item is for agency buildings and repairs, $5,200. The plaintiff says these expenditures were required by

article XII of the treaty of August 7, 1856 (11 Stat. 699), which provides, in part:

> So soon as the Seminoles west shall have moved to the new country herein provided for them, the United States will then select a site and erect the necessary buildings for an agency, including a Council house for the Seminoles.

The defendant replies that this obligation was discharged by the expenditure of $720 for a Council house and $4,950 for erecting agency buildings. Both of these amounts and the $5,200 claimed as a gratuity were spent under appropriation acts appropriating money for agency buildings and repairs, both of which were passed shortly subsequent to the treaty of 1856, one on February 28, 1859, and the other on June 19, 1860. The obligation of the treaty was to erect "necessary" agency buildings. It seems clear that the total amount spent was spent to fulfill the obligations of the treaty and that the defendant is not entitled to this offset.

The next item is "clothing, $610.00." This amount was expended in the year 1866 pursuant to the Appropriation Act of March 3, 1865 (13 Stat. 541). Under article IX of the treaty of 1856 the defendant obligated itself to remove the Florida Seminoles to the west, and to furnish them with certain specified articles of clothing. The report of the Commissioner of Indian Affairs of 1858 shows that the Florida Seminoles went to the west in 1858. On March 3, 1857, Congress appropriated the sum of $120,000 to fulfill the obligations of this article of the treaty. The report of the General Accounting Office filed September 9, 1934, shows that the sum of $88,697.05 was disbursed for this purpose. This presumably discharged this obligation of the treaty and the disbursement of $610 in 1866, eight years after the migration, must have been a gratuity. The defendant is, therefore, entitled to this offset.

The next item is "Education, $2,500.00." This offset the plaintiff concedes the defendant is entitled to. We agree.

The next item is "Expenses of delegates, $5,155.70." This amount was spent in the year 1857. The plaintiff says this

was spent pursuant to article XXIII of the treaty of 1856 (11 Stat. 705), which provides:

> A liberal allowance shall be made to each of the delegations signing this convention * * * as a compensation for their travelling and other expenses in coming to and remaining in this city and returning home.

The defendant replies that the obligation of this article was satisfied by the Appropriation Act of March 3, 1857 (11 Stat. 175), appropriating the sum of $11,000.00—

> * * * for the travelling and other expenses of the members of the Creek and Seminole delegations (including the agents and the interpreter for the latter) in coming to Washington, remaining, and returning home, per twenty-third article treaty seventh August, eighteen hundred and fifty-six, * * *.

The report of the General Accounting Office, however, does not show a disbursement of this money, but it does show this disbursement of $5,155.70 for "Expenses of delegates." Since no other expenditure is shown to fulfill this obligation, we think it fair to assume that the claimed gratuity must have been spent therefor. It results the defendant is not entitled to this offset.

Next to the last item is "Presents, $168.80." The defendant was under no obligation to give "presents" to the plaintiff, and while it may be considered bad form to charge a "present" to the donee, the defendant is nevertheless entitled to this offset under the act of August 12, 1935.

The final item is "Provisions and other rations, $4,657.57." The plaintiff says that this sum was spent to fulfill the obligation of article IX of the treaty of 1856, which obligated the defendant to remove to the west the Seminoles then in Florida, and to provide them with subsistence during their removal and for twelve months thereafter, and also to provide them with certain specified articles of clothing, etc. The Florida Seminoles removed to the west in 1858. All of the above amounts, except $300.00, were spent from 1860–1866. We hold, therefore, that the defendant is entitled to an offset on account of this item in the amount of $4,357.57.

The remaining items are "Fuel, light, and water, $98.50," "Miscellaneous agency expenses, $1,239.50," "Pay of Indian Agents, $15,475.05," "Pay of Interpreters, $3,910.00," "Pay of miscellaneous employees, $158.50." and "Transportation, etc., of supplies, $3,687.92."

The plaintiff points out in its brief that the treaty of 1856 required the United States to remove intruders from the Indian domain, to issue licenses to such persons as were authorized to trade within the domain, to protect them from domestic strife, hostile invasion, and from aggression from other Indians and white persons; and that the treaty also required the United States to pay the Seminoles certain sums, to pay interest on funds to be distributed *per capita*, to remove the Seminoles in Florida to the west, and to provide them with rations and subsistence for a certain period, and to distribute among them clothing, to pay delegations of Seminoles to Florida, and to survey the boundaries of the reservation. It says that agents, interpreters, employees and agencies were necessary in order for the United States to carry out these obligations of the treaty.

However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of *Blackfeet, et al. Tribes* v. *United States*, 81 C. Cls. 101, 137, and *Shoshone Tribe* v. *United States*, 82 C. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets.

It results that the defendant is entitled to offset $32,205.84 on account of the items set out in this finding.

4. *Defendant's claim of gratuity payments as set out in Finding 12*

The plaintiff's position with respect to the items claimed in this finding is that these sums were spent to fulfill the obligation of treaties.

The first item under this finding is "Education, $171.89." It seems clear that the defendant is entitled to this offset.

The next item is "Expenses of delegations, $4,309.00." We find no obligation in any treaty requiring the defendant to pay the expenses of any Indian delegation to Washington.

Nor do we find any obligation on the part of the defendant to feed and care for the plaintiff's livestock.

Items similar to the items of "Fuel, light, and water," "Miscellaneous agency expenses," "Pay of Indian Agents," "Pay of interpreters," "Pay of miscellaneous employees," and "Transportation, etc., of supplies" have been heretofore dealt with.

The plaintiff admits that the defendant is entitled to an offset for the item of "medical attention." We agree.

We have heretofore dealt with an item similar to the item of "Provisions and other rations."

It results that the defendant is entitled to offset $27,720.90 on account of the items set out in this finding.

5. Defendant's claim of gratuity payments as set out in Finding 13

The defendant claims an offset of the following items set out in this finding: appraising, enrolling, preservation of records, probate expenses, protecting property interests, sale of town sites, surveying, surveying and allotting, and traveling expenses. The plaintiff takes the position that the defendant incurred these expenses in carrying out the obligations of its agreements with the plaintiff.

By the treaty of August 7, 1856 (11 Stat. 699), certain lands were granted to the Seminoles west of the Mississippi River to be held by the tribe in common. In article IV of that treaty it was provided that no portion of the land conveyed "shall ever be embraced or included within, or annexed to, any Territory or State, nor shall * * * ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same." That same treaty in article XV provided that the "Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; * * *."

However, by 1893 white people had crowded into this Indian reservation in such numbers that they far outnumbered the Indians and so it became desirable, if not imperative, to abolish the tribal governments in this territory and

to bring it under the dominion of the laws of the United States.

In view of this situation, Congress, on March 3, 1893, passed an act (27 Stat. 645) appointing a commission to enter into negotiations with the tribes—

> * * * for the purpose of the extinguishment of the national or tribal title to any lands within that Territory * * * either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, * * * with a view to such and [an] adjustment * * * as may * * * be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

The act directed the commissioners to undertake to secure an agreement from the Indian tribes permitting an allotment of the lands in severalty, upon the accomplishment of which they were directed to "cause the lands of any such nation or tribe or band to be surveyed, and the proper allotment to be designated." The amount of $50,000 was appropriated for the carrying out of the commission.

Acting under the authority thereby vested, the commission entered into agreements with the various tribes in the Indian territory providing for the allotment of the tribal lands to the members of the tribe. The agreement with the Seminoles was ratified on July 1, 1898 (30 Stat. 567). Under that agreement it was provided "that all lands belonging to the Seminole tribe of Indians * * * shall be divided among the members of the tribe so that each shall have an equal share thereof in value * * *. Such allotment shall be made under the direction and supervision of the commission to the Five Civilized Tribes in connection with the representative appointed by the tribal government. * * *" This agreement further provided for the exclusion from lands to be allotted of certain coal, mineral, oil, and natural gas lands, etc., for the leasing and sale thereof, and for the payment to the individual members of the tribe of the proceeds thereof, together with such other money as might be in the hands of the United States belonging to the tribe.

There was no express provision in the Seminole agreement that the United States should bear the expense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. *Choctaw Nation* v. *United States*, 91 C. Cls. 320.

We hold, accordingly, the defendant is entitled to an offset of the above-mentioned items.

The plaintiff seems to admit that the defendant is entitled to an offset for the following items: clothing, expenses of delegates, livestock, medical attention, provisions and other rations. We think it is.

We have heretofore dealt with items of general office expenses, miscellaneous agency expenses, pay of miscellaneous employees, and per capita payment expenses. This leaves in dispute the item "Education, $20,377.89."

In 1904, according to the report of Special Agent Churchill, appointed by the Secretary of the Interior,[1] there were upwards of 100,000 persons of school age residing in the Indian territory who were not eligible to attend the tribal schools and were without free education.

By the Act of April 21, 1904 (33 Stat. 189, 215) Congress appropriated $100,000 for the maintenance, strengthening and enlarging of the tribal schools of the Creek, Cherokee, Chickasaw, Choctaw and Seminole Nations. Provision was made for the attendance of children of noncitizens. From that time on the schools in the territory were maintained both for members of the tribes and also for white people and negroes who were not members of the tribes. The report of the Commissioner of Indian Affairs in 1906, pp. 129–131, shows that in the fiscal year ending June 30, 1906, there were enrolled in the various schools in Indian territory 10,832 Indians, 43,011 whites, and 6,104 negroes. The schools were maintained both by appropriations from Congress and also by tribal funds. (See report of the Commissioner of Indian Affairs for 1905, p. 108.)

Since these sums were spent not only for the benefit of the plaintiff, but also for the benefit of white and negro

[1] House Document No. 522, 57th Cong., 1st sess., pp. 9, 32.

children, it is manifestly improper to charge them against the plaintiff as gratuities, especially since tribal funds were contributed to the support of the schools.

It results that the defendant is entitled to an offset of the amounts listed in finding 13 in the sum of $32,309.21. (Amended.) [1]

6. *Amounts claimed as offsets, as set out in Findings 14, 15, 17 and 18*

In findings 14 and 15 the defendant seeks an offset of 15 per cent of the amounts spent for the joint benefit of the Seminole and Creek Indians, on the theory that the members of the Seminole Nation comprised about 15 per cent of the total population of the Creek and Seminole tribes. The proof does not show how much of the aggregate amount was actually spent for the benefit of the Seminoles and how much for the benefit of the Creeks, but on the basis of prior decisions of this court and of the Supreme Court (see *The Sisseton and Wahpeton Bands of Indians* v. *United States*, 42 C. Cls. 416, 429; 208 U. S. 561, 567) the defendant would be entitled to an offset of 15 per cent of the total amount spent, since the membership in the Seminole tribe was 15 per cent of the total membership of the Creeks and Seminoles. This amounts to $513.74.

Defendant also seeks an offset of 4½ per cent of the amounts set out in findings 17 and 18, which were spent for the benefit of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations, because the members of the Seminole tribe are said to have composed approximately 4½ per cent of the total population of all the tribes. As in the case of amounts spent for the Creeks and Seminoles jointly, there is no proof as to what percentage of the amount spent for these five tribes was actually spent for the benefit of the Seminoles, but the proof does show that from 1861 to 1928 the Seminoles composed about 3.72 per cent of the total population of the five tribes. On the basis of the decisions cited *supra* the defendant is therefore entitled to an offset of 3.72 per cent of the total amount spent for the items listed in findings 17 and 18, amounting to $436,034.57.

[1] See opinion on motion for new trial, *infra*.

It results that the plaintiff is entitled to recover of the defendant the sum of $16,598.30 (amended),[1] made up of the following items:

Plaintiff's second amended petition:

Paragraph III, findings 3 and 4 (amended) [1]		$0.00
" IV, finding 5		13,501.10
" V, " 6		3,097.20
" VI, " 7		0.00
" VII, " 8		0.00
Total		16,598.30

and that the defendant is entitled to an offset against this of $725,715.22, made up of the following items:

Finding 9	$31,083.79
" 10	165,847.17
" 11	32,205.84
" 12	27,720.90
" 13 (amended) [1]	32,309.21
Findings 14 and 15	513.74
" 17 and 18	436,034.57
Total	725,715.22

[1] See opinion on motion for new trial, *infra*.

Plaintiff's petition must therefore be dismissed. It is so ordered.

LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

ON MOTION FOR A NEW TRIAL

(Decided May 5, 1941)

Mr. Paul M. Niebell for the plaintiff. *Mr. W. W. Pryor* was on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

WHITAKER, *Judge*, delivered the opinion of the court:

1. The plaintiff in its motion for a new trial says that in our opinion filed on January 6, 1941, we misconstrued the

provision of article IX of the treaty of August 7, 1856. It says the expression "after they shall all remove" refers to all of those Seminoles who could be induced to remove, and not to all of the Seminoles in Florida. Upon reconsideration we conclude that plaintiff is right. Under this article the United States agreed to remove to the country west "all those Seminoles now in Florida who can be induced to emigrate thereto." It also agreed to furnish "them" with sufficient rations during "their" removal and for twelve months after "their" arrival at "their" new homes. The words "them" and "their" refer, of course, to those Seminoles who had been induced to emigrate. So, when it was agreed, in conclusion, to "expend for them in improvements after they shall all remove the sum of twenty thousand dollars," the parties had reference to those Seminoles who could be induced to remove, and not to all the Seminoles in Florida. It is clear that when the treaty was agreed upon the parties contemplated that all of the Seminoles in Florida could not be induced to remove. Surely the defendant did not mean to agree to spend the $20,000 only on a condition it believed would never be met.

But, it has been suggested that, even though the obligation to spend this $20,000 in improvements arose on arrival in their new homes of all those Seminoles who could be induced to remove, yet the plaintiff is not entitled to recover, because that was an agreement for the benefit of individual Indians and not for the benefit of the tribe as a whole. The agreement was to spend for the immigrant Florida Seminoles $20,000 in improvements. It is not expressly stated whether the improvements to be made were public or private improvements, that is, whether they were to be for the common benefit of the Indians as a whole, or for the benefit of each individual; but we assume they were for the common benefit, since no individual owned any particular parcel of land, but all of them owned it all in common.

Does the fact that these improvements were to be for the benefit of the immigrant Florida Seminoles prevent the plaintiff nation from suing to recover the unexpended portion thereof? The Florida Seminoles after their arrival at the Seminole reservation in the west were no longer, if ever,

a separate entity. On arrival they became amalgamated with the other members of the tribe and lost whatever identity they may have had. Whatever improvements were made with the $18,210.00 that was spent were not set apart for the exclusive use of these Florida Seminoles but inured to the benefit of the whole tribe. No doubt the newcomers were quartered on arrival in an unoccupied part of the reservation, and the improvements were made there and so inured particularly to their benefit; but there is nothing to show that they were intended for their exclusive benefit. Improvements on the entire reservation were enjoyed by the entire tribe in common. The newcomers had an interest in the improvements already on the reservation in common with the other members of the tribe, and the earlier arrivals had an interest in the improvements made on the lands occupied by the newcomers in common with them. Neither any individual among those who emigrated from Florida, nor the group as a whole acquired title to these improvements to the exclusion of the other members of the tribe.

From the foregoing it seems clear that the cases of *Cherokee Nation* v. *United States*, 80 C. Cls. 1, *Sioux Tribe* v. *United States*, 89 C. Cls. 31, and *Blackfeather* v. *United States*, 37 C. Cls. 233; 190 U. S. 368, have no application. The *Cherokee* case was brought by only a portion of the tribe and for their benefit to the exclusion of other members of the tribe, and the *Sioux* case was grounded on a failure to pay certain individuals what they were individually entitled to, as was also the *Blackfeather* case. In the *Cherokee* case the suit was brought by the Cherokees by blood for their benefit to the exclusion of the Cherokees by adoption. In the *Sioux Tribe* case the suit was to recover amounts to which individual members were entitled when they devoted their allotments to agricultural purposes. The *Blackfeather* case was brought for the benefit of the individual members of the tribe whose property had been damaged or destroyed by depredations.

It results that the plaintiff is entitled to recover the unexpended balance of the $20,000, or $1,790. The opinion heretofore filed on January 6, 1941, is amended in accordance herewith.

2. In our opinion filed on January 6, 1941, we held that the defendant was entitled to an offset of all the items listed in finding 13, except the item of "Education, $20,377.89." By inadvertance, however, we failed to deduct this amount from the total of the items set out in this finding. Accordingly, the figures "$32,309.21" in the last line of the second full paragraph of the opinion on page 31 must be eliminated and the figures "$11,931.32" substituted therefor. The thirteenth finding on page 10 of the opinion will be amended by striking the word "gratuitously" in the third line thereof, putting a comma in the place of the colon at the end of the fourth line thereof, and adding after the comma the following: "all of which, except $20,377.89 for education, was spent gratuitously:".

The foregoing changes will make the second to the last paragraph of the opinion read as follows:

> It results that the plaintiff is entitled to recover of the defendant the sum of $18,388.30, made up of the following items:

Plaintiff's second amended petition:

Paragraph III, findings 3 and 4	$1,790.00
" IV, finding 5	13,501.10
" V, " 6	3,097.20
" VI, " 7	0.00
" VII, " 8	0.00
Total	18,388.30

> and that the defendant is entitled to an offset against this of $705,337.33, made up of the following items:

Finding 9	$31,083.79
" 10	165,847.17
" 11	32,205.84
" 12	27,720.90
" 13	11,931.32
Findings 14 and 15	513.74
" 17 and 18	436,034.57
Total	705,337.33

The plaintiff's motion for a new trial is allowed and the former findings of fact and opinion are amended in accordance with the foregoing opinion. It is so ordered.

GREEN, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

JOSEPH E. SEAGRAM & SONS, INC. v. THE UNITED STATES

[No. 44782. Decided February 3, 1941. Plaintiff's motion for new trial overruled May 5, 1941]

On the Proofs

Internal revenue; tax on distilled spirits lost or destroyed.—Where, as the result of an act of plaintiff's employee, 726.6 proof gallons of gin were lost by overflow of one of the cisterns or tanks in the cistern room of plaintiff's distillery, and where prior to the transfer of said gin from the gin house to the cistern room the manufacture of said gin had been fully completed, it is *held* that the plaintiff is liable for the tax on distilled spirits under section 1150 (a) (1) and section 1158 (b) of title 26 of the United States Code.

Same.—The tax is levied not on the manufacture of gin but on the manufacture of distilled spirits.

Same.—The tax on distilled spirits, "removed from the place where they were distilled and not deposited in bonded warehouses," is due as soon as said distilled spirits "is in existence as such," under subsections (b) and (c) of section 1150.

Same.—There is no provision of law which exempts a distiller from payment of the tax on distilled spirits because the liquors were lost or destroyed in the process of being removed from the distillery to the cistern room.

Same; negligence of distiller resulting in loss.—Where loss of distilled spirits was due to negligence of distiller, statutory provisions providing tax relief for distiller failing to produce certain percentage of estimate capacity of distillery and using materials in excess of its capacity are not applicable.

The Reporter's statement of the case:

Mr. Alfred D. Van Buren for the plaintiff. *Davies, Richberg, Beebe, Busick & Richardson* were on the briefs.

Mr. S. E. Blackham, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff, a corporation under the laws of the State of Indiana, with its place of business at Lawrenceburg, Indiana, was the proprietor of Registered Distillery No. 1, duly established and registered as required by law, and located at Lawrenceburg, Indiana.

2. In connection with the distillery, plaintiff had provided a cistern room and receiving cisterns as required by law, into which the spirits produced were conveyed and held prior to withdrawal for deposit and entry in a warehouse. This room and the receiving cisterns were kept locked at all times, the key to the lock being in the possession of and under the charge of the storekeeper-gauger, an employee of the defendant, who had been assigned to the distillery. All spirits were deposited in the receiving cisterns and were withdrawn therefrom under the supervision of said storekeeper-gauger.

The cistern room was located approximately 450 feet from the gin house. There were twenty receiving tanks therein, three of which, Numbers 13, 14, and 15, were allocated for the storage of gin. A separate pipe line connected each of these tanks with a manifold located in a room constructed on a balcony on the outside of the cistern room, with a door secured by a Government lock, the key to which was at all times in the possession of the storekeeper-gauger. There was a valve on each of the pipes leading to the cistern tanks, by means of which the flow of spirits to the respective tanks was regulated. The gin was pumped from the gin house to the cistern room through pipes which were connected with the manifold in the balcony room. At the end of each day a pumping order was made out prescribing the tanks into which the spirits should be pumped during the next twenty-four hours, and an inventory was made out by plaintiff's employee showing the tanks that were empty and those that were full and the amount of spirits in each tank.

3. It was required that the valve to only one tank be opened at a time. All other valves were required to be closed. When it was decided to change the flow of spirits from one cistern to another, an employee of the plaintiff would apply to the storekeeper-gauger to unlock the balcony room so that the valves might be changed. The storekeeper-gauger and plaintiff's employee would go to the balcony room together, and the employee would change the valves. At the end of the day plaintiff's employee would set the valve for the first tank into which the spirits were

to be pumped; later, when the flow was to be changed into another tank, another of plaintiff's employees would go with the storekeeper-gauger to the cistern room and make the change.

4. After the spirits had been distilled in the still house they were transferred to tanks in the gin house, where ingredients were added to give the gin flavor, and they were then further distilled and then conveyed through the pipe lines mentioned to the cisterns in the cistern room. When so conveyed they were of a high proof, and were reduced in proof in the cistern room before they were put into barrels.

5. On August 24, 1936, plaintiff's employee H. W. Seibel was in charge of the cistern room, imposed with the duty of taking an inventory of the cisterns at the end of the day's operations and of preparing a pumping order designating the cisterns into which the still house man was to pump during the next twenty-four hours. On the date stated, after having taken an inventory of the tanks, he found that tank Number 14 was the only one that was empty and, accordingly, he executed a pumping order directing the pumping of the spirits into this tank. Copies of the order were delivered to the warehouse office, to the gin house, to the plant manager's office, and to the defendant's storekeeper-gauger. However, he neglected to change the valve in the cistern room so that the spirits would be pumped into cistern Number 14, leaving the valve to tank Number 15 open. This tank was full, or nearly full, when the spirits were pumped into it during the night, as a result of which it overflowed and 726.6 proof gallons were lost. None of the plaintiff's employees requested the defendant's storekeeper-gauger to unlock the cistern room so that the valves could be changed so as to cause the spirits to flow into cistern Number 14, and such officer was not required to change the valves unless requested to do so by plaintiff's employees.

6. Plaintiff reported the loss of these spirits to defendant's district supervisor by letter dated August 25, 1936.

Plaintiff had produced spirits in excess of 80 percent of the producing capacity of its distillery for the month of August 1936, as estimated under the law and regulations by

defendant's employees, exclusive of the 726.6 proof gallons of gin so lost.

7. The tax provided for by law was assessed against the 726.6 proof gallons lost. Plaintiff applied for remission of said tax, but its claim therefor was rejected. Payment was demanded and was paid under protest by the plaintiff on November 2, 1936. The amount thereof was $1,453.20.

On November 5, 1936, plaintiff filed a claim for refund of the tax so paid, but this claim was rejected by the Commissioner of Internal Revenue on August 10, 1937.

8. Plaintiff is the sole owner of this claim and no assignment or transfer of it or any part thereof has been made.

Plaintiff has not been indemnified by insurance, or in any other way, on account of the loss of said 726.6 proof gallons of gin.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff sues to recover the tax assessed on 726.6 proof gallons of gin which were lost as a result of the overflowing of one of the cisterns or tanks in the cistern room of its distillery. The tank overflowed as a result of the failure of the plaintiff's employee to change the valve on the pipes leading from the gin house to the cistern room so as to change the flow of spirits from tank Number 15 into tank Number 14.

Prior to the transfer of the gin from the gin house to the cistern room the manufacture of gin had been fully completed, except that the proof had to be reduced by the addition of water; but the distillation of the distilled spirits used in the manufacture of the gin had been fully completed prior to the time that the gin was pumped from the gin house into the cistern room. Under these facts, is the plaintiff liable for the tax on distilled spirits?

Section 1150 (a) (1) of Title 26 of the United States Code, 1934 Edition, in effect at the time of this occurrence, levies a tax "on all distilled spirits produced in or imported into the United States * * * to be paid by the distiller

or importer when withdrawn from bond." Subsection (b) provides for the time of payment. It reads:

> The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, at any time within the period of limitation provided in section 1432 of this title, when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax, and, upon the neglect or refusal of payment by the distiller, shall proceed to collect the same by distraint. * * *

Subsection (c) relates to the time the tax attaches. It reads:

> The tax shall attach to distilled spirits, spirits, alcohol or alcoholic spirit, within the meaning of subsection (b) of section 1158 of this title, as soon as this substance is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production or by any subsequent process.

Section 1158 (b) defines "distilled spirits." It defines them as follows:

> Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this chapter, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses, or sugar, including all dilutions and mixtures of this substance.

When the 726.6 proof gallons of this liquid were spilled it had been manufactured into gin except that the alcoholic content had not been reduced to the proper amount. This reduction was accomplished by the addition of water. But whether or not the gin had been fully manufactured is immaterial to the question here because the tax is levied not on the manufacture of gin, but of distilled spirits. The distillation of the distilled spirits used in the manufacture of the gin had been completed some time before the loss. It was completed before the liquid was transferred from the gin house to the cistern room, and, indeed, before the spirits reached the gin house, where there was added the aromatic ingredients for the making of gin.

It is clear, therefore, that the tax levied on distilled spirits, spirits, alcohol, or alcoholic spirits had attached within the meaning of section 1150 (c), since the distilled spirits had clearly come into "existence as such." The plaintiff contends, however, that although the tax may have attached, it was not payable until the spirits were withdrawn. This is true, but this only applies to distilled spirits withdrawn *from bond*. It does not apply to spirits which had not been deposited in a bonded warehouse. This is provided for by section 1150 (b), which provides:

> The tax upon any distilled spirits, removed from the place where they were distilled and not deposited in bonded warehouse as required by law, shall, * * * when knowledge of such fact is obtained by the Commissioner, be assessed by him upon the distiller of the same, and returned to the collector, who shall immediately demand payment of such tax. * * *

We do not think there can be any doubt that the tax is due under the provisions of this section and under the provisions of subsection (c) relating to the time the tax attaches, since there is no provision of law which has been called to our attention, or of which we are aware, that exempts a distiller from payment of the tax because the liquors were lost or destroyed in the process of being removed from the distillery to the cistern room. Since the tax attaches as soon as the spirits come into existence as such, it must be payable at some time thereafter. Since the spirits were never deposited in the bonded warehouse, the provision fixing the time of payment as the time when they were withdrawn therefrom cannot be applicable; but it seems clear to us that the case comes squarely within the provision for the payment of the tax when it is removed from a distillery to a place other than a bonded warehouse.

We do not think that sections 1197 and 1198 have any application to the case at bar. Section 1197 relates to a failure to produce a certain percentage of the estimated capacity of the distillery and to a use of materials in excess of its capacity; and section 1198 provides relief for the distiller for a failure to produce this percentage of the distillery's capacity and for a use of excess materials, in certain cases. The assessment in the case at bar was not made under

section 1197, but under section 1150. But even if these sections were applicable, the plaintiff is entitled to relief under them for liquors lost only if they were lost without negligence on its part, and it is conceded that the loss here was occasioned solely by its negligence.

This decision is in accord with the decision of the Seventh Circuit Court of Appeals in *Joseph E. Seagram & Sons, Inc.* v. *Smith*, 113 F. (2d) 357. Cf. *Greenbrier Distillery Co.* v. *Johnson*, 88 Fed. 638, where the whiskey was destroyed in a railway accident; *Mason* v. *Peabody*, Fed. Cas. Number 9250 (16 Fed. Cas. 1060), where they were lost by fire and leakage; and *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 288 Fed. 326, where they were stolen.

Plaintiff's petition, therefore, will be dismissed. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

CHRISTOPHER S. LONG v. THE UNITED STATES

[No. 43642. Decided May 5, 1941]

On the Proofs

Pay and allowances; meaning of the word "allowances" as used in special act.—Decided upon the authority of *Sweeney* v. *United States*, 82 C. Cls. 640, and *Ralston* v. *United States*, 91 C. Cls. 91; 311 U. S. 687.

Same.—The purpose of a special act providing for the retirement of an officer in the Navy is to take something out of the general class into which it would otherwise fall.

Same.—The primary meaning of the word "allowances" has always been construed by both the Navy and the Army to be rental and subsistence.

The Reporter's statement of the case:

King & King for the plaintiff.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On November 19, 1926, plaintiff accepted appointment as Acting Chaplain in the United States Navy, with the rank of Lieutenant, junior grade, his rank to date from November 6, 1926.

2. On June 30, 1930, the President of the United States approved an Act (46 Stat. 1951) reading as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President is authorized to place Lieutenant (Junior Grade) Christopher S. Long, Chaplain Corps, United States Navy, upon the retired list of the Navy with the retired pay and allowances of that rank: *Provided*, That a duly constituted naval retiring board finds that the said Christopher S. Long has incurred physical disability incident to the service while on the active list of the Navy.

3. Subsequently, the plaintiff appeared before a duly constituted Naval Retiring Board, which found that he was permanently incapacitated for active service, and that his incapacity resulted from an incident of the service.

4. On October 3, 1930, the President approved the proceedings and findings of the Naval Retiring Board, and ordered plaintiff placed on the retired list of the United States Navy, with the rank of lieutenant, junior grade, Chaplain Corps, effective as of January 1, 1931.

5. On August 1, 1931, plaintiff had three dependents, consisting of a wife, Gwendoline Ellen Long, a daughter, Audrey Gwendoline Long, born April 11, 1922, and a son, John Stanley Long, born April 25, 1929. All of them have continuously resided with him since August 1, 1931, and have been dependent on him for their support.

6. Since being placed on the retired list, plaintiff has received the retired pay of an officer of his rank and length of service, but has received no rental or subsistence allowances.

7. If entitled to the rental and subsistence allowances of an officer of his rank and length of service with dependents, from August 1, 1931, to June 30, 1938, the date of the latest available roll on file in the General Accounting Office, there

is due him the sum of $7,676.84, as computed by the General Accounting Office. Plaintiff's claim is a continuing one.

8. Plaintiff's petition was filed on August 31, 1937. If that portion of his claim which accrued prior to August 31, 1931, is barred by the statute of limitations, there should be deducted from the amount due him the sum of $96.00, representing rental and subsistence allowances for the period August 1 to August 30, 1931.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

This suit was instituted by the plaintiff to recover the rental and subsistence allowances of his rank, with dependents, from August 1, 1931.

He had been commissioned as Acting Chaplain in the United States Navy with the rank of lieutenant, junior grade, effective as of the date of November 6, 1926.

The special act under which the claim was filed was approved by the President of the United States on June 30, 1930 (46 Stat. 1951) and reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President is authorized to place Lieutenant (Junior Grade) Christopher S. Long, Chaplain Corps, United States Navy, upon the retired list of the Navy with the retired pay and allowances of that rank: *Provided*, That a duly constituted naval retiring board finds that the said Christopher S. Long has incurred physical disability incident to the service while on the active list of the Navy.

On October 3, 1930, the President approved the proceedings and findings of the Naval Retiring Board which had found that he was permanently incapacitated for active service and that his incapacity resulted from an incident of the service.

The question in this case turns upon what is included in the term "retired pay and allowances of that rank" as used in the special act quoted above. It is contended by the plaintiff that the term "allowances" includes rental and subsistence. The defendant contends it does not include these items.

On two different occasions this court has passed upon the exact question at issue. *Sweeney* v. *United States*, 82 C. Cls. 640; *Ralston* v. *United States*, 91 C. Cls. 91, certiorari denied October 21, 1940, 311 U. S. 687. In each of these cases the language of the special act was substantially the same as in the case at bar. The questions were thoroughly considered and the court in each case reached the conclusion that the term "allowances" included rental and subsistence.

While the question is not altogether free from doubt, the court gave cogent reasons for the conclusions reached. Those two decisions construing exactly similar language are controlling in the instant case.

It is contended that the Congress in using the term "allowances" could not have meant to give to the plaintiff in this case provision that is not accorded officers of that rank generally. If that were true, why include the term "allowances" in the special act at all? Why not simply give him the privilege of going before the naval retirement board for retirement under the regular provision for retirement of officers generally? This would have given him the same retirement privileges provided for other officers.

The question is not what the Congress should have done, but what it actually did.

We have no right to pass on the wisdom of legislation. Our duty is simply to construe its practical effect, giving meaning to the language used and finding the intention of the Congress as disclosed by the language which it used in the special act.

The very purpose of a special act is to take something out of the general class into which it would otherwise fall. The courts have no more right to invade the legislative field than the legislature has to invade the domain of judicial interpretation.

Numerous articles in the code provide for allowances for officers of both the Navy and the Army. They cover a wide field, depending upon the facts and circumstances, the nature of the assignment, and the conditions under which they are applied. However, the primary meaning of the word "allowances" has always been construed by both the Navy and the Army to be rental and subsistence. In addi-

tion to these, under certain circumstances they may also have travel pay; they may have quarters instead of allowances for quarters, but the generally accepted meaning of the term "allowances" when used in the various articles of the code is that of rental and subsistence. These allowances—that is, rental and subsistence—are usually accorded officers in the active service only. That is the general provision of the law, and that is the position in which plaintiff would have found himself had the special act simply provided that he have the right to appear before the retirement board for retirement under the provisions of the general law.

The general provision for the retirement of officers is set out in Section 167, Title 14, U. S. C. A. It is as follows:

> All officers borne upon the retired list prior to April 12, 1902, or thereafter, shall receive 75 per centum of the duty pay, salary, and increase of the rank upon which they have been or may be retired: * * *

It will be noted that in this article of the code which makes provision for the retirement of officers generally there is no provision for allowances for such officers. In other words, officers generally do not receive allowances when they have been retired.

Again we repeat that had plaintiff been retired under this statute, making the same proof that he made in the instant case, he would have received no allowances.

The Congress, however, made special provision for him. What reason the Congress had—whether it thought he had been wronged, whether there were some special facts in the case which made the Congress believe special provision should be made for him, whether it was trying to make up for some injury that had been done him—it is not our province to inquire. We may not inquire into the reason, but only into the fact of what it did as disclosed by the language used.

If by the special act the Congress desired to make special provision for "allowances" for plaintiff, what more specific term could have been used in the light of the various provisions that have been made for officers under the term of "allowances," and in the light of a long line of construc-

tion which has been uniformly adopted by the Army and the Navy through regulations, and which regulations construe the term "allowances" to mean primarily rental and subsistence?

To construe the term "allowances" as used in the special act as not including rental and subsistence is to practically give it no meaning at all. It could not refer to travel pay, which is allowed only when an officer is assigned to some duty away from his regular post. It could not apply to rental and subsistence which he would be given if called back into active service since by the terms of Section 163, Title 14, U. S. C. A., all retired officers so recalled receive these allowances; therefore, the use of the term "allowances" in a special act was not necessary in order to secure to plaintiff such rights. Thus to deny the plain meaning of the term "allowances" is by judicial construction to eliminate the word used by the Congress and to strike it from an act that could have had no other purpose than to give the plaintiff, for some reason that was peculiarly within the province of the Congress, the special provision that was made in the special act. If the court takes any other position it practically nullifies the plain provision of the special act. We repeat we have no authority to do this.

It is urged that there are other privileges and perquisites which a retired officer has and which could have been included within the term "allowances." A simple examination of what those perquisites are will be sufficient to disclose the weakness of that position. One of these items is the right to hospitalization in naval hospitals. As a matter of fact, a deduction is made from the salary of all officers as a contribution to a hospital fund (Sec. 3, Title 24, U. S. C. A.). In other words, the officer purchases this right and pays for it. It becomes a vested right. The Congress would have no authority to take this away from him after he had purchased it. It is in the nature of an insurance contract. Another item urged is that he has commissary privileges; but these privileges are extended to officers of the Army and Navy, both active and retired, and even to civilian employees of the Army and Navy (Sec. 534, Title 34, U. S. C. A.). Other items suggested include the right to be carried on the Navy

Register and to wear the uniform of the highest wartime rank on ceremonial occasions. These items, of course, have no monetary value; on the contrary, they are usually a distinct expense. No legalistic phraseology can so warp the term "allowances" as to limit its application to the almost meaningless perquisites set out above.

Besides, it may be added that all the items above listed are accorded officers who are retired under the provisions of the general law. The plaintiff would have been entitled to these had he simply been given general retirement privileges. Whichever horn of the dilemma is chosen, we are driven to the conclusion that to construe the term "allowances" as not including anything more than the plaintiff would have been entitled to had he been retired under the general act is to nullify one of the main provisions of the special act that has been passed.

These facts are cited to show not only that the courts have practically determined this case by the principles enunciated in the *Sweeney* and *Ralston* cases, *supra*, but also to show the logical reason behind the construction there placed on the language of the Congress, which is supreme in the legislative field, and which for reasons it deems sufficient enacted into law the specific terms of the special act.

Plaintiff is entitled to recover the allowances claimed for a period beginning 6 years prior to August 31, 1937, the date on which the petition herein was filed. The case, however, is a continuing one, and entry of judgment will be suspended pending the receipt from the General Accounting Office of a statement of the amount due plaintiff in accordance with this opinion.

It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting:

I cannot agree that plaintiff is entitled to recover.

The question is whether Congress intended that plaintiff, having been made the beneficiary of a special act which permitted him to be retired though he had not fulfilled the usual requisites for retirement under the general statutes, intended

further to prefer him above all other officers who are retired under the provisions of the general retirement laws. The findings of fact show that preference will amount to about $1,000 a year for life.

Such a discriminatory intention on the part of Congress should not lightly be found, as it would run counter to the natural instincts of legislators in common with other people. Admittedly, Congress could entertain and make effective by legislation such an intent. But an intent so unusual should, before it is found by a court, be solidly supported by the text of the statute, or by explanatory language used in the Committee or on the floor.

Here we get no light whatever from committee report or debate relating to the special act. Indeed a search of committee reports and debates with reference to a considerable number of such special acts over a period of years discloses that only rarely is the language of the committee directly helpful to an interpretation of the act. One case in which the Congressional intent was disclosed was that of Frank A. Jahn, a temporary officer (lieutenant, junior grade) in the Navy. Section 6 of the Act of July 12, 1921, 42 Stat. 122, 140, provided for the retirement of temporary officers under the general retirement statute if application should be filed not later than October 1, 1921. Jahn, in August 1921, filed a paper which was construed by the Judge Advocate General not to be an application for retirement, so that his time for filing a proper application expired. A special act of March 4, 1923, 42 Stat. 1500, authorized the President to appoint Frank Jahn a lieutenant (junior grade) in the Navy and to retire him and place him on the retired list of the Navy "with the retired pay and allowances of that grade."

The House Report, 1252, 67th Congress, 2d Session, says of the bill which became the special act in that situation: "The purpose of this proposed legislation is to give to Frank A. Jahn the benefit of the Act of July 12, 1921, governing the retirement of temporary officers of the Navy."

The language of Jahn's act was the same as that of plaintiff's act. The Congressional intent in Jahn's case was not what plaintiff asserts that it was in his case.

The opinion of the majority suggests that perhaps plaintiff had been wronged; that Congress may have been making special provision for him for that reason. There is no word in any report or debate so indicating. If Congress had intended to give future preferential treatment to plaintiff to right a past wrong, it would have been natural for it to disclose that justification for treating this officer better than others.

To return to the text of the act, the majority opinion relies principally upon the use of the word "allowances" in the act, urging that unless plaintiff gets the rental and subsistence allowances of an active officer, which he is not, that word will be rendered meaningless since there are no "allowances", or only small ones for regularly retired officers. In the *Horton* and *Blair* cases, decided today, that argument was rejected by the court as to the word "emoluments," when used in special acts. It was shown that there are perquisites of office which regularly retired officers receive which satisfy the call of the word "emolument" for a meaning in the statute. Those mentioned are treatment in a naval hospital at much less than ordinary rates with free medical care while there, the privilege of buying at naval stores, and the privilege of sending one's children to the public schools in the District of Columbia while not residing in the District. Plaintiffs in the *Horton* and *Blair* cases got those "emoluments," and it was not thought necessary to give them still others which are denied their regularly retired brethren. The language of the special acts there involved, "with the retired pay and emoluments of that grade," received the interpretation "with the retired pay and retired emoluments of that grade." Thus a natural, easy, and non-discriminatory interpretation is made.

In this case the language of plaintiff's special act, "with the retired pay and allowances of that rank," receives in the majority opinion the interpretation "with the retired pay and *active service* allowances" of that rank. Thus a discriminatory and what seems to me a forced and unnatural interpretation is made.

This distinction is made, it is urged, because if it is not made, plaintiff will take nothing or little under the word

"allowances" in his statute. But what of the perquisites which Horton and Blair and all the regularly retired officers will receive, and will have to be satisfied with? It is said that they are small, and that Congress could not have meant so little when it used the word "allowances," though it meant just that when it used the word "emoluments."[1] It is also said that Congress could not have meant these perquisites, because all officers retired under general law receive them. This seems to me to involve a presumption that Congress intended to discriminate in favor of plaintiff and against all other officers, and a search for a meaning that will fulfill that presumption. I think the presumption should be the opposite, and that the meaning which lies readily at hand should be adopted.

Three general statutes use substantially the language of the special act here in question. Section 1026, Title 10, U. S. Code, enacted in 1916, reenacted in 1920 and 1939, relates to army officers and is as follows:

> Any officer who shall have served four years as chief of a branch, and who may subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the grade held by him as such chief.

Section 1026a, Title 10, U. S. Code, enacted in 1901, also relating to army officers, provides:

> Any officer who on February 2, 1901, held office in any corps or department, and who, since said date, has served or shall have served as chief of a staff corps or department and who shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by law for the retirement of such corps or department chief.

Section 443, Title 5, U. S. Code, enacted in 1908, reenacted in 1922 and again in 1938, without modification here material, is as follows:

> Any officer of the Navy who is now serving or shall hereafter serve as a chief of a bureau in the Navy Department, and shall subsequently be retired, shall be retired with the rank, pay, and allowances authorized by

[1] In addition to the perquisites mentioned in the *Horton* case, see U. S. Code, Tit. 34, sec. 994 (*a*), (*b*), (*c*), fixing the pay and *allowances* of an officer on the retired list, when on active duty.

law for the retirement of such bureau chief, and any officer of the Navy who prior to July 1, 1922, has served four years as chief of a bureau in the Navy Department and shall be retired subsequent to the completion of such period of service for physical disability due to wounds inflicted by the enemy while in the performance of his duty shall be retired with the rank, pay, and allowances now authorized by law for the retirement of a chief of a bureau.

Every officer retired under the provisions of those statutes has the same right to active service allowances after he retires from the active service that plaintiff has. If the word "allowances" as used in those statutes can be satisfied, as to officers retiring under them, by their receiving what their brethren receive in the way of perquisites, I see no reason why plaintiff should receive more. Although a departmental interpretation giving such retired officers the allowances of officers in the active service would have lent strong support to plaintiff's argument, considering that two of the statutes have been recently reenacted without material change after many years of administration, plaintiff has made no showing that they have received such an interpretation.

The decision of the majority adheres to the previous rulings of the Court in the *Sweeney* and *Ralston* cases. I think those decisions were wrong. It seems to me that today's decision of the Court in the *Willey* case relies upon an immaterial verbal distinction between that case, on the one hand, and the present case and the *Sweeney* and *Ralston* cases, on the other. The necessity for such distinctions should be removed by declining to follow further the *Sweeney* and *Ralston* cases. I would dismiss plaintiff's petition. I am authorized to say that Judge Littleton agrees with the views here expressed.

LITTLETON, *Judge:* I concur in all the reasons given and the conclusions reached in the foregoing dissenting opinion and believe that they are fully sustained by the cases of *United States* v. *Kirby*, 7 Wall. 482, 486, 487; *Ryan et al* v. *Carter et al*, 93 U. S. 78, 84; *Heydenfeldt* v. *Daney Gold and Silver Mining Co.*, 93 U. S. 634, 638; *United States* v. *Moore*, 95

U. S. 760, 763; *United States* v. *Saunders*, 120 U. S. 126, 129; *United States* v. *Jones*, 131 U. S. 1–14, 16–19; *United States* v. *Chase*, 135 U. S. 255, 258; *Petri* v. *Commercial National Bank of Chicago*, 142 U. S. 644, 650; *Holy Trinity* v. *United States*, 143 U. S. 45, 47, 49; *In re Chapman*, 166 U. S. 661, 667; *Rhodes* v. *Iowa*, 170 U. S. 412, 422; *Hamilton* v. *Rathbone*, 175 U. S. 414, 419, 421; *United States* v. *Farenholt*, 206 U. S. 226, 229; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284, 293, 296; *Ozawa* v. *United States*, 260 U. S. 178, 193, 194; *United States* v. *Katz et al*, 271 U. S. 354, 362; *United States et al* v. *American Trucking Associations, Inc. et al.*, 310 U. S. 534, 542, 544, 553; *Shacklette* v. *United States*, 71 C. Cls. 376.

EDWARD A. BLAIR v. THE UNITED STATES

[No. 43641. Decided May 5, 1941]

On the Proofs

Pay and allowances; meaning of "emoluments" as used in special act.—Where a special act of Congress authorized the President to place upon the retired list an officer of the Marine Corps "with the pay and emoluments" of his grade, it is *held* that the word "emoluments" as used in the said act does not include the "allowances" authorized by law to be paid an officer of his grade who is on active duty. *Sweeney* v. *United States*, 82 C. Cls. 640, and *Ralston* v. *United States*, 91 C. Cls. 91, distinguished.

The Reporter's statement of the case:

King & King for the plaintiff. *Messrs. John W. Gaskins* and *Fred W. Shields* were on the brief.

Miss Stella Akin, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. On November 12, 1906, plaintiff was appointed a cadet in the U. S. Revenue Cutter Service and served as such cadet until May 27, 1908, when his resignation from that office was accepted. Thereafter, on January 22, 1909, he accepted ap-

pointment as Second Lieutenant in the U. S. Marine Corps.

2. Plaintiff served as an officer of the Marine Corps until September 11, 1913, when he was ordered to appear before a Marine Retiring Board, which Board, after hearing the evidence in his case, found him incapacitated for active service by reason of a disease of the spine; and that such incapacity was not the result of an incident of the service. On October 22, 1913, the President approved the proceedings and findings of the Board, and directed that plaintiff be wholly retired from the service, in conformity with Sections 1622 and 1252 of the Revised Statutes. Plaintiff thereupon was wholly retired from the service on October 22, 1913.

3. On January 30, 1929, the following Act of Congress was approved (45 Stat. 2043):

> That the President is authorized to appoint Edward A. Blair a second lieutenant of the United States Marine Corps and to retire him and place him upon the retired list of the Marine Corps with the retired pay and emoluments of that grade.

Pursuant to the above act, the plaintiff was, on February 14, 1929, appointed a Second Lieutenant of the U. S. Marine Corps, with rank from January 30, 1929, which appointment he accepted on February 18, 1929. On February 18, 1929, he was placed on the retired list of officers of the Marine Corps with the rank of Second Lieutenant, where he has since remained.

4. Since being placed on the retired list, plaintiff has received the retired pay of an officer of his rank and length of service, but has received no rental or subsistence allowances. If entitled to the rental and subsistence allowances of an officer of his rank and length of service, without dependents, from August 1, 1931, to July 31, 1938, the date of the latest available roll on file in the General Accounting Office, there is due him the sum of $4,683.52, as computed by the General Accounting Office. Plaintiff's claim is a continuing one.

5. Plaintiff's petition was filed on August 31, 1937. If that portion of his claim which accrued prior to August 31, 1931, is barred by the statute of limitations, there should be deducted from the amount due him the sum of $58, represent-

ing rental and subsistence allowances for the period August 1 to 30, 1931.

The court decided that the plaintiff was not entitled to recover.

GREEN, *Judge*, delivered the opinion of the court:

The plaintiff, a retired officer in the United States Marine Corps, brings this suit to recover rental and subsistence allowances.

The findings show that by virtue of a special act of Congress, set out therein, plaintiff was appointed a Second Lieutenant in the United States Marine Corps and placed upon the retired list thereof "with the retired pay and emoluments of that grade." Although he is on the retired list, he brings this suit alleging that by the terms of the act under which he was retired he is entitled to recover the allowances authorized by law to be paid an officer of his grade who is on active duty. In support of this claim the plaintiff relies upon *Sweeney* v. *United States*, 82 C. Cls. 640, and *Ralston* v. *United States*, 91 C. Cls. 91, but we think the decisions made in those cases have no application.

In the cases cited above it appears that the act authorizing the plaintiffs' appointments was worded differently. The appointment was made in each case, as specified in the acts, "with retired pay and *allowances* of that rank" (or grade). In an extended opinion in the *Sweeney* case, *supra*, we held in effect that the act of Congress authorizing the appointment was ambiguous; that there were no allowances made by law to officers on the retired list; and that unless we construed the act to refer to the allowances made to officers on active duty the word "allowances" would be given no meaning or significance whatever and the same effect would be placed on the act as though the word "allowances" was omitted entirely. This, the opinion held, we could not properly do.

The *Ralston* case, *supra*, merely followed the *Sweeney* case.

It will be observed that the decision in the *Sweeney* case was based on the theory that unless the word "allowances" was treated as applying to the allowances of the active service there was no meaning that could be ascribed to it. In

the instant case no such problem arises. Officers on the retired list receive benefits and privileges and any benefit or privilege is an emolument. Under the statutes and military regulations a retired officer is entitled to hospitalization in Navy Hospitals under certain conditions, and he is also permitted to buy merchandise procured by the Navy for resale to its officers and men. While living in the District of Columbia his children are entitled to attend the schools without payment of tuition. His name is carried on the Navy Register and he has the right to wear the uniform of his highest war-time rank on ceremonial occasions. All these matters are included by the word "emoluments."

It is true that the word "emoluments" might also include pay and allowances, if the connection so indicated, but it does not. The pay was otherwise provided, and we see no reason to think that Congress intended by the use of the word "emoluments" to include anything except the emoluments of a retired officer. This would give the plaintiff just what any other retired officer would receive, which, we think, was plainly the intent of the statute. The use of the word "emoluments" made clear the award and was necessary to give the plaintiff the same status as other retired naval officers.

Our conclusion is that the plaintiff is not entitled to receive the allowances for which he brings suit and that his petition must be dismissed.

It is so ordered.

JONES, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, concurs:

I concur in the result, and in the opinion of the Court except as it distinguishes the *Sweeney* and *Ralston* cases. As I have indicated in my dissenting opinion in the *Christopher S. Long* case, decided today, I see no material distinction between this case and those, and think they should be overruled.

Judge Littleton has authorized me to say that he agrees with this view.

Opinion of the Court

THE CREEK NATION v. THE UNITED STATES

[No. L–137. Decided May 5, 1941]

On Defendant's Motion to Dismiss

Motion to dismiss; demurrer to the evidence; rules of the Court.—A motion to dismiss the petition upon the ground that the evidence produced by the plaintiff shows no liability is, in effect, a demurrer to the evidence, and as such is not a proper motion under the rules of the Court of Claims, following the decision of the court in *Vogelstein & Co.* v. *United States*, 55 C. Cls. 490.

Mr. Paul M. Niebell for the plaintiff. *Mr. E. J. Van Court* was on the brief.

Messrs. Clifford R. Stearns and *Raymond T. Nagle*, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The facts sufficiently appear from the opinion of the court, *per curiam*, as follows:

In this case the evidence for the plaintiff has been presented and the plaintiff has filed requested findings of fact, together with a brief. The defendant thereupon filed a motion to dismiss the petition on the ground that upon the facts and the law plaintiff has shown no right to recover. The parties agree that the motion is in effect a demurrer to the evidence, and have so treated it in their respective arguments.

The plaintiff, however, contends that there is no provision for a demurrer to the evidence in the rules of this court, and that such a proceeding is not recognized in the practice before it. The plaintiff therefore asks that the motion be overruled without considering the evidence and that the case be considered in the ordinary way. The issue so presented will be first considered.

The defendant argues that such a motion is proper. But unless the rule is different in Indian cases the question now arising has been decided by this court adversely to this contention.

It will be observed that defendant does not desire to have the case submitted upon the evidence which plaintiff has

presented, as it might do, but desires to have this evidence considered and have the case dismissed if the evidence is held insufficient; but if a prima facie case is made out it will expect to introduce evidence on its part and then proceed to final submission. An identical situation arose in *Vogelstein & Co.* v. *United States*, 55 C. Cls. 490, in which defendant presented no evidence or request for findings of fact, nor admitted the correctness of plaintiff's evidence and requested findings, but sought to test the sufficiency of plaintiff's evidence by a demurrer thereto. The motion was overruled, the court holding that its rules prescribe the method of preparation of a case and make no provision for the suspension of the preparation of a case for trial by a defendant and its right to make a motion to test the sufficiency of plaintiff's evidence to sustain the cause of action. The court further held in effect that a general rule allowing such a practice would result in delay, inconvenience, and injury to the respective parties. The same rule is laid down in *Smitheman* v. *United States*, 48 C. Cls. 449, wherein a demurrer to the evidence had been filed, but the court said:

> If the court should undertake to sustain this demurrer, we would be establishing a practice so confusing as to be wholly impracticable. If plaintiff's evidence should be found to present a good cause of action, defendants would then claim the right to take their evidence, and the court would necessarily be constrained to permit a second hearing and in the regular way under the proper practice provided for us by the Supreme Court on a probably different state of facts from that developed by the use of the demurrer.

Accordingly it was held that the demurrer should be overruled.

The defendant cites the case of *Monroe* v. *United States*, 35 C. Cls. 199, in support of the motion. This case is considered and distinguished in the opinion rendered in the *Vogelstein* case, *supra*, and the situation therein was found to be different, especially that in the *Monroe* case, *supra*, the facts were directly agreed upon, so that the submission of the motion carried with it a complete submission of the case.

It is argued on behalf of the defendant that a submission of the evidence at this time would save trouble and expense

to the litigants, especially to the defendant. In Indian cases the testimony is usually in the form of depositions or documents and for that reason the court has not deemed it necessary to refer the evidence to a commissioner for a report upon the facts. But we find nothing in the rules which supports the contention of the defendant, and we think that to sustain defendant's motion would introduce a practice which, as said in the *Vogelstein* and *Smitheman* cases cited above, would in the long run be the cause of more uncertainty and delay than benefit. In many instances it would require the case to be twice submitted. It is therefore ordered that the defendant's motion, considered as a demurrer to the evidence, be overruled without prejudice to any defense which defendant may have, and the case proceed in the regular manner.

THE CREEK NATION v. THE UNITED STATES

[No. L-205. Decided May 5, 1941]

On the Proofs

Indian claims; error in survey; cession of lands occupied by plaintiff.—Where the defendant in 1881 purchased from the Creek Nation, plaintiff, 175,000 acres of plaintiff's lands immediately east of the so-called "Creek dividing line," and where in surveying said tract the defendant ran the eastern line thereof at such a distance from the "Creek dividing line" as to include 176,198.99 acres instead of 175,000 acres, all of which 176,198.99 acres were allotted and patented to members of the Seminole tribe, by whom they were occupied; and where in 1889, by treaty, the Creek Nation granted to the defendant all of its lands except so much of the former domain of said Creek Nation "as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation"; it is *held* that the plaintiff is not entitled to recover, since no part of the said 176,198.99 acres was "held and occupied as the home of" said Creek Nation when the agreement of 1889 was entered into.

Same.—Where in executing the treaty of 1898 the parties acted under a mutual misapprehension of facts as to the proper location of the eastern boundary of the tract but not as to the lands actually occupied by the Creeks; it is *held* that the plaintiff intended to grant to the United States the entire tract as surveyed, although it later developed that this tract in fact included slightly more than the 175,000 acres.

Same.—It is a well established general rule that calls in a deed for natural objects or fixed artificial monuments control over calls for distances. *Higueras* v. *United States*, 5 Wallace, 827, 835, and other cases cited.

The Reporter's statement of the case:

Mr. Paul M. Niebell for the plaintiff. *Mr. C. Maurice Weidemeyer* was on the briefs.

Mr. Wilfred Hearn, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant. *Mr. Raymond T. Nagle* was on the brief.

The court made special findings of fact as follows:

1. The amended petition in this case was filed pursuant to the acts of Congress of August 16, 1937 (c. 651, 50 Stat. Part I, 650); February 19, 1929 (45 Stat. 1229); May 19, 1926 (c. 341, 44 Stat. 568); and May 20, 1924 (c. 181, 43 Stat. 133).

2. By the treaty of June 14, 1866 (14 Stat. 785), the Creek Nation ceded to the United States the west half of its then domain, reserving to itself the eastern half thereof. In 1871 Frederick W. Bardwell surveyed and established the line dividing the western one-half from the eastern one-half of the Creek domain. This line was approved by the Secretary of the Interior on February 5, 1872, and was subsequently approved by the Creek Nation and by the act of Congress of March 3, 1873 (c. 322, 17 Stat. 626).

3. On March 21, 1866, the defendant entered into a treaty with the Seminole Nation (14 Stat. 755), under the terms of which a tract of 200,000 acres was granted to them immediately west of the "Creek dividing line." Before said line had been run the Seminoles were settled on what was supposed to be the tract granted them, but sometime after the line was run, it was discovered that this was in error and that they had been settled in part on lands retained by the Creeks. In the meantime the Seminoles had made substantial improvements on this land. To remedy this situation, the defendant on February 14, 1881, purchased from the plaintiff an additional 175,000 acres of its domain immediately east of the "Creek dividing line," as run by Bardwell, and bounded

on the south by the Canadian River, and on the north by the North Fork thereof, and on the east by a north and south line run at such distance from the western boundary as to include 175,000 acres. The amount of $175,000 was duly paid for these lands.

4. In 1888 C. F. Hackbusch was employed to survey this tract and to fix the eastern boundary thereof. He was instructed to retrace the Bardwell line from the point of beginning on the Canadian River to its intersection with the North Fork thereof, to meander both rivers, and to establish the eastern boundary at such place as to include 175,000 acres.

5. He located on the Canadian River the marker established by Bardwell as the beginning of the dividing line. He also located Bardwell's 4-mile corner, but not in its proper place, and he located Bardwell's 38-mile and 40-mile corners, but was unable to locate any intermediate markers. His retracement of the Bardwell line ran from the point of beginning located on the ground, through the 4-mile corner to the 38-mile corner, which was about 3 miles north of the North Fork of the Canadian River.

This line was to the west of the Bardwell line as set out in Bardwell's field notes. These notes described the point of beginning as 20 miles and 64.43 chains east of the meridian of the mouth of Pond's Creek. This point is 34.65 chains east of the marker established by Bardwell and located by Hackbusch. From these two points the two lines (the one retraced by Hackbusch and the one described in Bardwell's field notes) gradually converge at the 38-mile post established by Bardwell and located by Hackbusch.

6. The tract laid off by Hackbusch, bounded on the west by the Bardwell line as retraced by him, contains 176,198.99 acres; the tract laid off by him, bounded on the west by the Bardwell line as described in Bardwell's field notes, contains 171,567 acres.

All of the lands to the eastern boundary as established by him have been allotted to the members of the Seminole Nation. The plaintiff has received no compensation for any excess over 175,000 acres.

7. On January 19, 1889, an agreement between the plaintiff and defendant was entered into, ratified by Congress on March 1, 1889 (c. 317, 25 Stat. 757), which reads in part as follows:

> Whereas by a treaty of cession made and concluded by and between the said parties on the fourteenth day of June, eighteen hundred and sixty-six, the said Muscogee (or Creek) Nation, in compliance with the desire of the United States to locate other Indians and freedmen thereon, ceded and conveyed to the United States, to be sold to and used as homes for such other civilized Indians as the United States might choose to settle thereon, the west half of their entire domain, to be divided by a line running north and south, which should be surveyed as provided in the eighth article of the said treaty; the eastern half of the lands of the said Muscogee (or Creek) Nation to be retained by them as a home;
>
> And whereas but a portion of said lands so ceded for such use has been sold to Indians or assigned to their use, and the United States now desire that all of said ceded lands may be entirely freed from any limitation in respect to the use and enjoyment thereof and all claims of the said Muscogee (or Creek) Nation to such lands may be surrendered and extinguished as well as all other claims of whatsoever nature to any territory except the aforesaid eastern half of their domain;
>
> Now, therefore, these articles of cession and agreement by and between the said contracting parties, witness:
>
> I. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereinafter mentioned [$2,280,857.10], hereby absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

On the date this agreement was entered into the Seminole Nation was occupying, to the exclusion of the Creeks, all the

former Creek territory west of the eastern boundary of the 175,000-acre tract as fixed by Hackbusch, and bounded on the south by the Canadian River and on the north by the North Fork thereof.

The court decided that the plaintiff was not entitled to recover.

WHITAKER, *Judge*, delivered the opinion of the court:

On December 27, 1937, the plaintiff filed its amended petition suing to recover the value of 2,397.71 acres of its land which it alleges the defendant took from it without compensation, and which it gave to the Seminole Nation. However, in its reply brief filed on April 5, 1941, plaintiff says that but 1,198.99 acres of its lands were taken, and it asks judgment for the value of only so many acres.

The alleged taking is said to have occurred in this way: The defendant on February 14, 1881, purchased from the Creek Nation 175,000 acres of its lands immediately east of the so-called "Creek dividing line," bounded on the south by the Canadian River, and on the north by the North Fork thereof. The plaintiff alleges that in surveying this 175,000-acre tract the defendant ran the eastern line thereof at such a distance from the "Creek dividing line" as to include 176,198.99 acres instead of 175,000 acres; and that all of these 176,198.99 acres have been allotted and patented to members of the Seminole tribe. The first issue in the case is whether or not the area so surveyed did in fact contain more than 175,000 acres, and if so, how much more.

I

The acreage in question was purchased by the Secretary of the Interior pursuant to the act of March 3, 1873 (c. 322, 17 Stat. 626), which act in its preamble recites that the Creek Indians had ceded to the United States "the west half of their entire domain, to be divided by a line running north and south," and that—

> * * * the recent survey of said line, made in conformity with the provisions of said treaty, includes within the limits of the Creek reservation east of said line some of the improvements made on a reservation selected on what was supposed to be the Creek ceded lands for the Seminole tribe of Indians.

In view of the facts recited, the Secretary of the Interior was authorized to purchase from the Creeks—

> * * * such portions of their country as may have been set apart in accordance with treaty stipulations for the use of the Seminoles, * * * found to be east of the line separating the Creek ceded lands from the Creek reservation.

Pursuant thereto, the Secretary of the Interior entered into an agreement with the Creek Nation, which, after reciting the portion of said act just quoted, provided in part as follows:

> And the said Creek delegation do hereby agree, for and on behalf of said nation, that they will cede to the United States, and do hereby cede, a strip of land in the Indian Territory, now occupied by the Seminole Nation of Indians, lying east of the said line dividing the Creek lands from the lands ceded to the United States in the treaty of June 14, 1866; bounded on the north by the North Fork of the Canadian River; on the south by the Canadian River; on the west by the dividing line between the Creek Reservation and the lands ceded under treaty of 1866 above noted; and on the east by a line running north and south between the rivers named, so far east of said division line as will comprise within said described boundaries one hundred and seventy-five thousand (175,000) acres, * * *.

The survey of the line referred to in the Act was that made by Frederick W. Bardwell in 1871 and approved by the Secretary of the Interior February 5, 1872; and the line referred to in the agreement dividing the Creek lands from those ceded to the United States is the line as surveyed by Bardwell. Plaintiff conveyed to defendant 175,000 acres east of this line.

Thereafter, in 1888, the defendant employed one Hackbusch to run the east boundary of said tract. In the instructions issued to him by the Commisisoner of the General Land Office it was provided:

> * * * The division line between the Creek Reservation and the ceded lands was surveyed and marked in the field (under the direction of the Indian Office) in 1871, by F. W. Bardwell, Civil and Topographical Engineer. I inclose herewith a copy of the field notes of Bardwell's survey of said divisional line from the Ca-

nadian River to and across the North Fork of the Canadian. It will be necessary for you to retrace the Bardwell line from the point where the same intersects the north bank of the Canadian River to the point of intersection with the south bank of the North Fork of the Canadian River, and to carefully measure the distance between these points. This measurement is required in order that the exact distance may be ascertained, and that any error which may have occurred in the original survey may be eliminated, the length of this line being one of the elements for computing the position of the east boundary of the tract to be run and marked under your contract.

Having ascertained the points of intersection of the Bardwell line with the north bank of the Canadian, and south bank of the North Fork of the Canadian, and the exact distance between said points, as well as the true course of the line, meander both rivers from said points down stream for quantity, that is, to such a distance that a due north and south line connecting said meanders will include an area of 175,000 acres.

Pursuant to these instructions, Hackbusch undertook to locate the Creek dividing line as run by Bardwell. According to his field notes he located on the north bank of the Canadian River in the south a cedar post which corresponded in all respects to the post described by Bardwell in his field notes, and he also located Bardwell's 4-mile corner, and also his 38-mile and 40-mile corners, but he was unable to locate any other monuments. His retracement of the Bardwell line ran in a straight line from the starting point on the Canadian River through the 4-mile corner to the 38-mile and 40-mile corners, the latter two of which were just north of the North Fork of the Canadian River. This retracement, however, is to the west of the Bardwell line as shown by the Bardwell field notes. On the Canadian River it is 34.65 chains to the west thereof and gradually converges therewith at the 38-mile corner.

This Hackbusch survey was examined in the field by H. B. Martin, Examiner of Surveys in the General Land Office, said by the Acting Commissioner of the General Land Office to be "the best examiner of surveys ever employed by this office," who verified it in all particulars, saying, "this survey taken as a whole is a model of excellence." Later it was

approved by the General Land Office. A. D. Kidder in his report, mentioned in the next paragraph, says, "The accuracy [of this survey] is far above the average of the land surveying practice of that date."

While the present case was pending the Department of Justice, with the consent of the plaintiff, requested the General Land Office to make a field examination with respect to the location of the "Creek dividing line." This investigation was made by Arthur D. Kidder, District Cadastral Engineer, who reported to the Commissioner of the General Land Office on March 18, 1941, showing the location on the map of the Hackbusch retracement of the Bardwell line and of the Bardwell line as shown by Bardwell's field notes. According to his report, the area included in the tract to the east of the Bardwell line as shown by Bardwell's field notes is 171,567 acres, and the area included to the east of the Hackbusch retracement of the Bardwell line is 176,198.99 acres. If the Bardwell line, as located by the Bardwell field notes, is to be treated as the true Creek dividing line, then there has been included in the 175,000-acre tract an acreage less than the total acreage purchased from the Creeks. But, on the other hand, if the true Creek dividing line is not that shown by Bardwell's field notes, but is the Bardwell line as retraced by Hackbusch, then there has been included in the tract 176,198.99 acres, or 1,198.99 acres more than was purchased from the Creeks. For these 1,198.99 acres the plaintiff has not been compensated.

The Bardwell line as shown by his field notes is to the east of his line as retraced by Hackbusch, for the reason that his field notes fix the starting point on the Canadian River at a point 20 miles and 64.43 chains to the east of the meridian of the mouth of Pond Creek; whereas, the starting point in Hackbusch's retracement, the cedar post described in Bardwell's field notes and located on the ground by Hackbusch, is 34.65 chains to the west thereof. The question then is, which point shall be accepted as the true starting point of the Bardwell line, the place described in his field notes as 20 miles and 64.43 chains from the mouth of Pond Creek, or the actual marker on the ground as located by Hackbusch.

It is a well-established general rule that calls in a deed for natural objects or fixed artificial monuments control over calls for distances. *United States* v. *State Investment Co.*, 264 U. S. 206; *Spreckles* v. *Brown*, 212 U. S. 208, 212; *Higueras* v. *United States*, 5 Wallace, 827, 835. In the last cited case it was said:

> * * * where the lines are so short as evidently to be susceptible of entire accuracy in their measurement, and are defined in such a manner as to indicate an exercise of care in describing the premises, such a description is regarded with great confidence as a means of ascertaining what is intended to be conveyed. But ordinarily surveys are so loosely made, and so liable to be inaccurate, especially when made in rough or uneven land or forests, that the courses and distances given in the instrument are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries referred to as identifying the land. Such monuments may be either natural or artifical objects, such as rivers, streams, springs, stakes, marked trees, fences, or buildings.

So, in this case the actual marker on the ground, placed there by Bardwell, must control over the distance which Bardwell said this point was from a natural object more than 20 miles away. Especially is this true with respect to this survey, since in several other instances the distances given by Bardwell's field notes are shown to be inaccurate. For instance, the distance from the point of beginning to the 4-mile corner was 11.30 chains short of the actual distance measured by Hackbusch, and from the 4-mile corner to the 38-mile corner there was a discrepancy of 54.55 chains.

The true Bardwell line, therefore, is that line as retraced by Hackbusch. Kidder's report shows that in the territory bounded by this line on the west and by the eastern boundary established by Hackbusch there are 176,198.99 acres, or 1,198.99 more than the defendant has paid for.

II

But the defendant says that even though more than 175,000 acres were included in Hackbusch's survey of the tract, nevertheless, the plaintiff is not entitled to recover because of the

provisions of the agreement of January 19, 1889, between the Creeks and the defendant, ratified by Congress on March 1, 1889 (c. 317, 25 Stat. 757). The pertinent parts of this agreement read as follows:

> I. That said Muscogee (or Creek) Nation, in consideration of the sum of money hereinafter mentioned, hereby absolutely cedes and grants to the United States, without reservation or condition, full and complete title to the entire western half of the domain of the said Muscogee (or Creek) Nation lying west of the division line surveyed and established under the said treaty of eighteen hundred and sixty-six, and also grants and releases to the United States all and every claim, estate, right, or interest of any and every description in or to any and all land and territory whatever, except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

Under this agreement the plaintiff granted to the defendant all of its lands—

> * * * except so much of the said former domain of the said Muscogee (or Creek) Nation as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation.

It is clear that the plaintiff did not mean by this clause to except from the grant the 175,000 acres ceded to the defendant by the agreement of February 14, 1881, although these lands lay "east of the said line of division." It was the intention to except from the grant only such lands as lay "east of the said line of division" as were then "held and occupied as the home of said nation." Except for the last qualifying phrase, the 175,000-acre tract would have been excepted from the grant. The defendant says that no part of the 176,198.99 acres included in the Hackbusch survey was "held and occupied as the home of" the Creek Nation when this agreement of 1889 was entered into. The record shows this to be true in fact. Hackbusch in his field notes said:

> This line (the east boundary of the Seminole), in accordance with special instructions, was run so far east of the Creek Dividing Line as to include an area of

> 175,000 acres. But the one hundred seventy-five thousand acres do not embrace all the lands now occupied by the Seminoles. Some valuable property remains east of the east boundary, such as the store and post office at We-wo-ka; the We-wo-ka mission; the store and post office at Arleka and several homesteads of the Indians. As near as I can estimate, not having a positive knowledge, it will take about twenty-five thousand acres more or less to include all the property of the Seminole Indians, which now remains east of the east boundary, as surveyed by me, under my contract of June 26, 1888.

There is also other evidence in the record to show that the land occupied by the Seminoles was largely in excess of the 175,000 acres defendant purchased from the Creeks. We have, accordingly, found as a fact that the Creek Nation on the date of the treaty of January 19, 1889, did not hold and occupy this excess of 1,198.99 acres as their home, and said lands were not, therefore, excepted from the grant to the United States.

At the time this treaty of 1889 was executed Hackbusch had run the eastern boundary of the 175,000-acre tract, and both the Creeks and the Seminoles at that time believed that the strip now in question was within the area granted to the Seminole tribe. When the agreement of 1889 was entered into, the parties intended that there should be conveyed all of the lands east of the Creek dividing line and up to the line as established by Hackbusch.

It is true that the parties in executing this treaty acted under a mutual misapprehension of fact as to the proper location of the eastern boundary of the tract, but not as to the lands actually occupied by the Creeks. We think it was for the precise reason that it was thought there might be some inaccuracy in the establishment of the eastern boundary of this tract that the parties limited the exception from the grant, not to any precise acreage east of the dividing line, but to such lands as were held and occupied as the home of the Creek Nation. Had they intended to limit the exception to the 175,000 acres, no more and no less, it would seem that this acreage would have been specifically mentioned.

We are, therefore, of opinion that the plaintiff intended to grant to the United States the entire tract as surveyed by Hackbusch, although it later developed that this tract in fact included slightly more than the 175,000 acres.

It results that plaintiff is not entitled to recover and its petition will, therefore, be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

DEWEY SCHMOLL, SUCCESSOR ASSIGNEE OF MURCH BROTHERS CONSTRUCTION COMPANY v. THE UNITED STATES

[No. 42858. Decided May 5, 1941]

On the Proofs

Government contract; failure to show delay.—Where the record shows that the plaintiff was not delayed by the defendant nor unreasonably delayed or interfered with in the proper prosecution and performance of the work called for by its contract with the heating and plumbing contractor; it is *held* that plaintiff is not entitled to recover.

Same; decision of contracting officer.—It is *held* that the decision of the contracting officer and the head of the department was correct with reference to plaintiff's claims as to the expense of fastening pipe sleeves to its concrete forms and plaintiff is not entitled to recover, upon the evidence of record and the provisions of the specifications.

Same; refusal of subcontractor to accept reduction.—Where plaintiff made a written proposal to defendant that certain painting be omitted and agreed to accept a reduction on that account in its total contract price, and where plaintiff's subcontractor refused to accept a like reduction in his contract with plaintiff; it is *held* that the defendant is not liable for the difference.

The Reporter's statement of the case:

Mr. Dean Hill Stanley for the plaintiff. *Mr. Joseph R. McCuen* and *Tilson, Stanley and McCuen* were on the brief.

Mr. Carl Eardley, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

Plaintiff seeks to recover $20,088.79. Of this amount $18,288.79 is claimed as damages for alleged breach of contract resulting from alleged unnecessary costs and expenses incurred in completing the work called for by the contract, which expenses plaintiff claims arose from unreasonable delay and interference by the contractor for heating, plumbing, and electrical work, for which, it alleges, the defendant was responsible. Included in the total amount claimed is an item of $1,800 for certain work, including profit and overhead, which plaintiff claims it was not required to perform under its contract but which was required to be performed by the mechanical contractor who had a separate contract with the defendant to furnish and install the plumbing and heating equipment.

The court having made the foregoing introductory statement, entered special findings of fact as follows:

1. Murch Brothers Construction Company, hereinafter referred to as the plaintiff, is a Missouri corporation, and at the times hereinafter mentioned had its principal office and place of business at St. Louis. January 3, 1936, after this suit had been instituted, plaintiff made an assignment for the benefit of its creditors, and Dewey Schmoll, the successor assignee of the corporation by proper order of the court, was substituted for the corporation as plaintiff. April 11, 1932, plaintiff entered into a contract with the defendant represented by L. H. Tripp, Director of Construction of the Veterans' Administration, under which contract, and the specifications forming a part thereof, plaintiff agreed to construct a Veterans' Administration Home at Roseburg, Oregon, consisting of eleven separate structures which included two large hospital buildings and nine smaller buildings. The invitations for bids to be opened April 1, 1932, together with detailed specifications and standard contract forms, were issued and delivered to prospective bidders February 20, 1932. These invitations for bids and specifications called for separate bids to be considered in connection with the making of contracts for—first, "General Construction;" second, "Plumbing, Heating, and Electrical Work;" third, "Electric Elevators;" fourth, "Sewage Treatment Works;" and fifth, "Refrigerating and Ice-making

Plant." The invitation for bids and the specifications upon which plaintiff submitted its bid, and on which it was awarded a contract, were for "General Construction" of the buildings, roads, and other work called for therein. The invitation for bids stated that separate bids would be received and separate contracts made for the several classes of work mentioned, and the General Provisions of the Specifications (section 1G, par. 7) and the Standard Forms of Contracts awarded (section 13), including the contract and specifications of plaintiff, provided that "The Government may award other contracts for additional work, and the contractor shall fully cooperate with such other contractors and carefully fit his own work to that provided under other contracts as may be directed by the contracting officer. The contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor."

Plaintiff submitted its bid of $663,000 for the "General Construction" work as called for by the specifications and contract to be completed and delivered within 260 calendar days after the date of receipt of notice to proceed, except that the radial brick chimney and a sufficient amount of work in the boiler house to permit the installation of boilers and equipment were to be completed 90 days prior to the end of the 260-day period. The work was to be commenced within 10 days after receipt of notice to proceed and such notice was received by plaintiff May 12, 1932, thereby fixing January 27, 1933, as the date for completion of all the work called for by its contract. Plaintiff actually commenced work April 25, 1932, 17 days before receipt of notice to proceed. The invitation for bids, which became a part of plaintiff's contract, provided that "Time of performance will be an essence of the contract and bids will be evaluated on the basis of time. In evaluating bids there will be added to each bid, other than the one offering to complete in the shortest time, an amount equal to the daily liquidated damages named in the invitation for bids, multiplied by the number of calendar days that such bidders have named for performance of the work in excess of the days named by the bidder proposing to do the work in the shortest time."

Plaintiff's contract (Article 9) and specifications, section 1G, par. 37, and paragraph 5 of amendments to section 1G, fixed the amount of liquidated damages for delay at the rate of $150 a calendar day.

Plaintiff's contract and specifications contemplated that rock would be encountered in excavating for the foundations of the buildings required to be constructed by plaintiff, but plaintiff was not required to include in the amount of its bid an amount to cover the cost of this particular work. Section 1C, paragraph 1 (a), of the General Specifications relating to "Earthwork", entitled "Work Included," provided:

> The work includes clearing the sites and excavating, filling and grading required and not provided under other contracts, for the general construction of buildings and to new contours shown on plot plan.

Paragraph 2 (c) of the same section provided:

> Should rock, within the definition of these specifications, be encountered it will be paid for as an extra as hereinafter specified, but the contractor will excavate earth and such other materials as may be encountered at his expense.

Paragraph 3 (a) of the same section, entitled "Rock Excavation", provided:

> Should rock be encountered within the limits of the required excavations, payment for removal of same will be made subject to such adjustment as is provided by articles 3 and 4 of the contract.

From time to time reasonable change orders under Articles 3 and 5 of the contract, to provide for the amounts to be paid per cubic yard for rock excavated and extensions of the contract time, were also allowed in connection therewith. These reasonable change orders were accepted by plaintiff and no portion of the amount claimed herein is based on any of such written changes in the contract price and time.

2. Section 34C, paragraph 1, of the specifications of plaintiff's contract, entitled "Roads, Walks, Grading, and Drainage", provided

> WORK INCLUDED: This work consists of excavation and grading for walks, roads, and lawns, and the construction complete of concrete walks, concrete pavement,

bituminous concrete roads, cast iron, culverts, concrete steps and end walls, catch basins, and inlet, all as indicated on drawing and as specified herein. * * * Should change orders issue during the progress of the work involve the movement of earth, payment for such changes will be made on the basis of yardage in the cut section, whether the cut is made for excavation or for borrow. No material will be paid for as both excavation and fill.

Section 1G, paragraph 32, page 11, of the specifications of plaintiff's contract, provided

USE OF ROADWAYS: For their hauling, contractors must use only the established roads and such temporary roads which may be necessary for their work and as may be authorized by the Superintendent. Such temporary roads shall be constructed by the contractors at their own expense. When necessary to cross curbing sidewalks or some construction, they must be protected by well-constructed bridges.

Where new permanent roads are shown on drawings and are to be a part of this contract, the contractor shall have the privilege of immediately constructing them so as to facilitate building operations and these roads shall be used by all who have business thereon within the zone of building operations but at the completion of all work, the roads must be left in perfect condition.

3. Under the invitation for bids and detailed specifications issued February 20, 1932, for all plumbing, heating, and electrical work required and necessary to be installed in the buildings, for the construction of which plaintiff was awarded a contract, C. J. Redmon, trading as Redmon Heating Company, submitted a bid of $264,723, which was accepted; and, on April 18, 1932, Redmon and the defendant, represented by L. H. Tripp, Director of Construction, Veterans' Administration, entered into a contract for the plumbing, heating, and electrical work under which Redmon agreed to furnish all labor and materials and perform all work required for complete installation in and at the buildings, to be constructed by plaintiff, of plumbing, heating, and electrical work, including all outside distribution systems for all buildings, but not including sewage treatment works, refrigeration and ice plant. Redmon's con-

tract contained the same provision with reference to other contracts as did Article 13 of plaintiff's contract, hereinbefore quoted in finding 1. Redmon received from the defendant notice to proceed on or about the same date on which notice to proceed was given to plaintiff.

Plaintiff was given copies of the contract and specifications between the defendant and Redmon, and Redmon was given copies of the contract and specifications between the defendant and the plaintiff. May 11, 1932, plaintiff prepared and furnished to the contracting officer a copy of its anticipated project schedule under which plaintiff expected to be able to complete all the work called for by its contract by January 1, 1933.

4. In construction projects, such as the one here involved, where one contractor is engaged in general construction work and another contractor is engaged in plumbing, heating, and electrical work, it is the established and recognized practice that the general contractor, who in this case was plaintiff, must keep his general construction work well in advance of the work of the plumbing and heating contractor, and keep the portion of the structures, in connection with which the plumbing and heating contractor is to perform his work, substantially free from scaffolding form work, form supports or "jacks", and other materials or debris. The mechanical contractor, Redmon, performed his work of installing heating and plumbing equipment within the reasonable bounds of this recognized practice and requirement.

In the latter part of May 1932 C. J. Redmon, the heating and plumbing contractor, was at the site of the work, where he remained for several days conferring with the representative of the defendant's contracting officer and with plaintiff's superintendent, and otherwise investigating conditions with reference to the commencement and carrying on of the work called for by his contract. On June 18, 1932, Redmon's superintendent arrived at the site of the work where he thereafter continuously remained until the work called for by Redmon's contract had been completed.

5. Plaintiff completed the work called for by its contract and the same was accepted by the defendant May 6, 1933,

99 days after January 27, 1933, the expiration date of the contract period of 260 days for completion. The contracting officer during progress of the work called for by plaintiff's contract, and soon after completion thereof, granted plaintiff certain extensions of time which, in all, totaled 109 days. This was 10 days more than was necessary in order to enable plaintiff to complete its work within the contract time as extended. These extensions of time were allowed by the contracting officer in connection with and by reason of unusually severe weather and reasonable change orders under Article 3 of the contract fixing the amount of compensation as contemplated by the contract and specifications for certain rock and earth excavation work performed by plaintiff.

6. Plaintiff was not delayed by defendant in the performance of the work called for by its contract. Plaintiff was not unreasonably delayed in the performance of its contract with the defendant by failure of Redmon properly to carry on and perform the heating, plumbing, and electrical work called for by his contract. In the circumstances and under the conditions disclosed by the entire record, Redmon did not commit any act which unreasonably interfered with the proper performance by plaintiff of the work called for by and required under its contract with the defendant.

7. Section 1G, page 11, paragraph 34 of the specifications of plaintiff's contract provided as follows:

> TEMPORARY HEAT: The contractor shall furnish heat to prevent injury to work or materials through dampness or cold. At all times when there is concrete not thoroughly set, and after starting to apply the first coat of plastering, he shall maintain a temperature of at least 40 degrees F. For ten days previous to the placing of the interior wood finish and during the time that varnish is being applied a temperature of at least 70 degrees F. shall be maintained in the building. The use of salamanders or other types of heating which may smoke and damage the finished walls, etc., will not be allowed.

The amounts which are shown by the record to have been expended by plaintiff between January 27, 1933, the contract date for completion of the work, and May 6, 1933, the date on which the work was completed, for temporary

heating, repairs to heating apparatus, repairs to temporary roads, premiums upon compensation insurance, compensation to employees, and overhead are as follows:

1. Heating expense	$5, 015. 67
2. Repairs and replacements to heating apparatus	706. 59
3. Repairs to temporary roads	345. 00
4. Total premium on compensation insurance	318. 56
5. Compensation to plaintiff's employees	2, 395. 00
6. Overhead	3, 152. 70
Total	$11, 933. 52

Interest on 10 percent of the contract price retained by the defendant during such period, when figured at 6%, is $943.47.

8. Section 2C of the Standard Specifications for "Concrete Work and Materials" provided in paragraph 1, entitled "Work Included," as follows:

> The work includes all mass and reinforced concrete necessary for the work specified or shown on drawings or required to complete the work in a satisfactory manner. The following standard requirements for concrete shall apply to all work of contract, except as distinctly otherwise specified.

Paragraph 11 of the above-mentioned section 2C of the specifications of plaintiff's contract, entitled "FORMS", provided as follows:

> (d) Build into the construction all wall ties, anchors, wood blocks, inserts for support of pipe hangers, etc., hangers for suspended ceilings, nailing strips, grounds, etc., required or as hereinafter specified.
>
> (e) Also build in sleeves for pipe lines as furnished and located by contractor for Heating, Plumbing and Electric Work, etc. Wherever these sleeves or fixtures interfere with beams or girders, etc., the contractor shall provide special slab and beam construction as required to take care of these conditions.

The specifications of the contract of C. J. Redmon provided as follows:

> PIPE SLEEVES: All pipe sleeves must be built in place as the walls, etc. are laid up. All pipe sleeves shall be provided by the plumbing contractor and shall be built in by the construction contractor as directed and as the work progresses, but the "Plumbing" contractor shall furnish exact location for pipe sleeves.

Where pipes pass through footings, sleeves shall be provided which shall be cast-iron pipe not less than 4 inches larger in diameter than pipes for which same are installed.

Early in the construction work called for by plaintiff's contract, plaintiff constructed certain forms for concrete work and called upon the contracting officer to require C. J. Redmon, the heating and plumbing contractor, to furnish, locate, install, and fasten in the concrete forms erected by plaintiff all necessary pipe sleeves so that when the concrete had been poured into the forms and had hardened there would remain an opening through the concrete for plumbing and heating pipes. Redmon insisted that provisions of both contracts required plaintiff to fasten the pipe sleeves to its forms as this was a part of the work of building in such sleeves. The contracting officer found and decided that, under the provisions of the contracts of plaintiff and Redmon with reference to the pipe sleeves and inserts, Redmon was required only to determine and properly mark on the concrete forms the exact location of the sleeves and to furnish to plaintiff such sleeves cut to proper length, and that, under the provisions of the contract that all pipe sleeves should be built in by the construction contractor as directed and as work progressed, plaintiff was required to fasten the pipe sleeves to its concrete forms so as to properly build them into the concrete structure at the locations furnished and indicated by the plumbing and heating contractor, Redmon. Plaintiff appealed and this decision was approved by the head of the department.

During progress of the work the heating and plumbing contractor, Redmon, provided plaintiff with all pipe sleeves and furnished the plaintiff with the exact location of these sleeves. Pursuant to the decision of the contracting officer and the head of the department, plaintiff did the work of fastening these sleeves to the concrete forms at the locations furnished and marked by Redmon before the concrete was poured into the forms and around the sleeves. The expense to plaintiff of fastening the sleeves furnished by Redmon to the concrete forms and at the locations furnished by Redmon, including profit and overhead, was $1,800.

9. Practically all the work called for by plaintiff's contract was performed by subcontractors. It had a subcontract for the painting called for by its contract. For reasons not necessary to be here set forth, plaintiff, on March 24, 1933, requested the contracting officer in writing to modify its contract to eliminate therefrom the painting of plastered walls and ceilings for which a reduction of $5,500 in the contract price was proposed. Defendant agreed to this modification and the amount of the deduction to be made, and a change order was accordingly issued by the contracting officer. Thereafter, when plaintiff took this matter up with its subcontractor, the subcontractor refused to accept a reduction of $5,500 in its painting contract with plaintiff but did consent to a reduction of $3,200 and the matter was settled between plaintiff and its subcontractor on that basis. Plaintiff here seeks to recover the difference of $2,300 from the defendant.

The court decided that the plaintiff was not entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In this case plaintiff seeks to recover from defendant, as damages, alleged additional and unnecessary expense, plus overhead and profit, totaling $18,288.79 incurred between January 1, 1933, the date on which plaintiff alleges it would have completed the work called for by its contract, and May 23, 1933, when it received its final payment under the contract, by reason of alleged interference with the proper prosecution of the work called for by its contract and unreasonable delay in completion thereof caused by defendant's plumbing and heating contractor, C. J. Redmon. The actual expenses to plaintiff for temporary heating, as well as labor and expenses incident thereto, and for other matters for the period January 27, 1933, the expiration date of the contract period, and May 6, 1933, when the work was completed and accepted, including the expense of repairs to temporary roads, are set forth in finding 7. The amounts stated in that finding, including the claimed interest on the retained percentage, are those

shown by the evidence, and total $12,876.99. We are of opinion, however, that plaintiff is not entitled to recover on this phase of its claim for the reason that the record shows and we have found as a fact that plaintiff was not delayed by the defendant, nor was it unreasonably delayed or interfered with in the proper prosecution and performance of the work called for by its contract with C. J. Redmon, the heating and plumbing contractor—(see finding 6). We think from the entire record that plaintiff's delay in completing its contract within the time agreed upon was caused, first, by plaintiff proposing too short a period of time under all the conditions and circumstances reasonably to be expected for the completion of the work called for by its contract and specifications; second, by weather conditions; third, by its inability to get certain of its materials and supplies to the site of the work when needed; and, fourth, by reason of the performance of the excavation work which the contract and specifications contemplated would be required, and for the performance of which reasonable change orders were issued as contemplated and called for in the contract and specifications.

In view of the facts established and for the reasons above mentioned, plaintiff is not entitled to recover any portion of the amount of $12,876.99 set forth in finding 7.

The next item of plaintiff's claim is for $1,800, representing the expense of fastening pipe sleeves to its concrete forms as a part of the work of building in such sleeves in the concrete work called for by the contract. Upon the evidence of record and in view of the provisions of the specifications, quoted in finding 8, and constituting a part of the contracts of plaintiff and the heating and plumbing contractor, we are of opinion that this matter was correctly decided by the contracting officer and the head of the department. Plaintiff's contract required it to "build in sleeves for pipe lines as furnished and located by contractor for Heating, Plumbing and Electric Work", and the contract of the plumbing and heating contractor required that he should provide all pipe sleeves which would be built in by the construction contractor as directed, but that the

plumbing contractor should furnish the exact location for the pipe sleeves. Under this language of the contracts, we think it is clear that the fastening of the sleeves furnished by the plumbing contractor at the location designated by him on plaintiff's forms for concrete work was a part of and included in the phrase "shall be built in by the construction contractor as directed and as the work progresses." We do not think that a distinction should be made between setting or fastening the sleeves in the forms and the building in of the sleeves. The greater weight of evidence of record shows that contract provisions, such as we have here, are interpreted by the trade to require the general contractor to fasten the inserts and sleeves to its forms. For these reasons plaintiff is not entitled to recover on this item of its claim.

The last item of the claim is for $2,300 (finding 9) which plaintiff seeks to recover from the defendant solely because plaintiff's painting subcontractor refused to agree to a reduction in its contract of more than $3,200. Prior to the time plaintiff took this matter up with its subcontractor, plaintiff made a written proposal to the defendant that certain painting be eliminated and agreed to accept a reduction on that account of $5,500 in its total contract price. Upon consideration, this proposal was accepted in writing by the defendant and a change order was accordingly issued. The evidence does not establish that this reduction in plaintiff's contract price was excessive for the painting work called for by its contract and eliminated therefrom under the agreement between the parties. The mere fact that plaintiff's subcontractor later refused to accept a like reduction in his contract with plaintiff does not render the defendant liable for the difference. The record shows that there were other circumstances, not connected with the value to the defendant of the painting eliminated from plaintiff's contract, which entered into the refusal of plaintiff's subcontractor to accept the reduction in his contract of the full amount of $5,500, which plaintiff and defendant had agreed upon as the amount properly deductible under the prime contract.

Plaintiff is not entitled to recover on any of the items of its claim, and the petition is therefore dismissed. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

FRANK O. LOWDEN, JAMES E. GORMAN, AND JOSEPH B. FLEMING, TRUSTEES OF THE ESTATE OF CHOCTAW, OKLAHOMA & GULF RAILROAD COMPANY, DEBTOR, v. THE UNITED STATES

[No. 43074. Decided May 5, 1941]

On the Proofs

Royalties on leases of Indian coal lands sold under the Act of February 8, 1918; effective date of title.—Where by an act approved February 8, 1918, Congress authorized the Secretary of the Interior to sell at public auction the coal deposits, leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations and to make all necessary regulations for the sale; and where under the provisions of said act the plaintiff (railroad) was the successful bidder on certain tracts at the sale held on December 11, 1918, which bids were not approved by the Secretary until August 29, 1919, it is *held* that the sale of said tracts was not effective until the date of approval.

Same; continued possession by lessee.—Where the plaintiff (railroad) was the lessee of several developed and undeveloped tracts of coal deposits in the segregated mineral area of the Choctaw and Chickasaw Nations, each such tract covered by a separate lease; and where at the public sale of said tracts plaintiff was the successful bidder on all of the tracts on which plaintiff held leases; and where a successful bidder at such sale was not entitled to possession until his bid had been approved by the Secretary of the Interior; it is *held* that the continued possession of said tracts by the railroad until approval of said bids was as lessee, under the terms of the lease and subject to the burdens of the lease, one of which was the payment of royalty.

Same; credit for advance royalties on undeveloped coal lands.—Where the act providing for the sale of said coal lands, after allowing the lessee credit of one-half of the advance royalty on any undeveloped lease owned by him, to be applied to the purchase

price of said tract if bought by said lessee, provided "that any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any other lease which he may own and operate"; it is *held* that this provision could by its terms apply only where the lessee of the undeveloped lands continued to operate as lessee on some other lands not purchased by said lessee, and said advance royalties on such undeveloped lands could not be applied to the production royalties which said railroad as purchaser was required to pay as a security for the ultimate payment of the purchase price, to be credited against such purchase price.

The Reporter's statement of the case:

Mr. Robert E. Lee for the plaintiff. *Mr. Thomas P. Littlepage* was on the briefs.

Mr. Raymond T. Nagle, with whom was *Mr. Assistant Attorney General Norman M. Littell*, for the defendant.

The court made special findings of fact as follows:

1. The Choctaw, Oklahoma & Gulf Railroad Company (hereinafter sometimes referred to as the "Railroad") is a corporation organized under the Act of Congress approved August 24, 1894, and has its principal place of business in Chicago, Illinois.

June 7, 1933, plaintiffs were duly appointed trustees of the Railroad by the District Court of the United States for the Northern District of Illinois, in accordance with section 77, chapter VIII of the Bankruptcy Act, and are now the duly qualified and acting trustees thereof.

2. By written agreements dated February 21, 1899, the mining trustees of the Choctaw and Chickasaw Indian Nations leased to the Railroad for a period of thirty years, for the purpose of prospecting for and mining coal, 17 developed and 4 undeveloped tracts of coal deposits in the segregated mineral area of the Indian nations in Oklahoma. These leases were entered into in pursuance of the provisions of the Act of Congress approved June 28, 1898 (30 Stat. 495), and the rules and regulations prescribed by the Secretary of the Interior on October 7, 1898, relative thereto.

These leases provided that the Railroad should pay to the United States Indian Agent for the Union Agency, Indian

Territory, as royalty on the production of all coal mines developed and operated thereon, the sum of 10 cents per ton for each ton of coal produced. These leases further contained the following provision:

> And the party of the second part [the Railroad] further agrees and binds itself, its successors or assigns to pay or cause to be paid to the United States Indian Agent for the Union Agency, Indian Territory, as advanced royalty on each and every mine or claim within the tract of land covered by this lease the sums of money as follows, to wit: One hundred dollars per annum, in advance, for the first and second years; two hundred dollars per annum in advance, for the third and fourth years; and five hundred dollars per annum, in advance, for the fifth and each succeeding year thereafter, of the term for which this lease is to run, it being understood and agreed that said sums of money to be paid as aforesaid shall be a credit on royalty should the party of the second part [the Railroad] develop and operate a mine or mines on the lands leased by this indenture, and the production of such mine or mines exceed such sums paid as advanced royalty as above set forth, and further, that should the party of the second part [the Railroad] neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable under this lease, then this lease shall be null and void, and all royalties paid in advance shall become the money and property of the Choctaw and Chickasaw tribes of Indians, subject to the regulations of the Secretary of the Interior aforesaid.

3. During the period commencing March 1, 1899, and ending December 10, 1918, the Railroad, pursuant to the terms of the leases, paid a total advance royalty of $125,924.64 on the developed tracts of coal deposits. Of that sum $105,845.68 had been credited against the royalties for the production of coal from developed tracts, leaving a balance of $20,078.96 advance royalties unapplied and standing to the credit of the Railroad on December 11, 1918.

During the period commencing March 1, 1899, and ending December 10, 1918, the Railroad, pursuant to the terms of the lease, paid a total advance royalty of $34,400 on the undeveloped tracts of coal deposits, and the entire amount thereof stood to the credit of the railroad on December 11, 1918.

4. By an act approved February 8, 1918 (40 Stat. 433), Congress authorized the Secretary of the Interior to sell the coal and asphalt deposits, leased and unleased, in the segregated mineral areas of the Choctaw and Chickasaw Nations in Oklahoma in the manner therein set forth. The pertinent sections of that act read as follows:

> SEC. 1 Before offering such coal and asphalt deposits for sale the Secretary of the Interior, under such rules and regulations as he may prescribe, shall cause the same to be appraised. Such appraisement, both as to leased and unleased lands, shall be described in tracts to conform to the descriptions of the legal subdivisions heretofore designated by the Secretary of the Interior, and shall be completed within six months after the passage of this Act.
>
> SEC. 2. That the sale of such deposits shall be thoroughly advertised, and shall not later than six months from the final appraisement be offered for sale to the highest bidder at public auction in tracts to conform with such appraisement at not less than the appraised value so fixed, except that isolated tracts of less than nine hundred and sixty acres may be sold separately under like provisions: *Provided*, That twenty per centum of the purchase price shall be paid in cash, and the remainder shall be paid in four equal annual payments from the date of the sale, and all deferred payments on all deposits sold under the provisions of this Act shall bear interest at the rate of five per centum per annum, and shall mature and become due before the expiration of four years after the date of such sale.
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> *   *   *   *   *
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> SEC. 4. That such deposits of coal or asphalt on the leased lands shall be sold subject to all rights of the lessee and that any person acquiring said deposits of coal or asphalt shall take the same subject to said rights and acquire the same under the express understanding and agreement that the Department of the Interior will cancel and withdraw all rules and regulations and relinquish all authority heretofore exercised over the operation of said mines by reason of the Indian ownership of said property and that said properties thereafter shall be operated under and in conformity with such laws as may be applicable thereto, and that advance royalty paid by any lessee and standing to the credit of said lessee shall be credited by said purchaser to the extent of the amount thereof, and that no royalties shall be paid

by said lessee to said purchaser until the credit so given shall be exhausted at the rate of 8 cents per ton mine run, and that the royalty to be paid thereafter by said lessee to said purchaser shall be 8 cents per ton mine run of coal, and that any lessee may, at any time after completion of such sale, transfer or dispose of his leasehold interest without any restriction whatever; and that any lessee shall have the preferential right, provided the same is exercised within ninety days after the approval of the completion of the appraisement of the minerals as herein provided, to purchase at the appraised value any or all of the surface of the lands lying within such lease held by him and heretofore reserved by order of the Secretary of the Interior and upon the terms as above provided, and shall also have the preferential right, except as herein otherwise provided, to purchase the coal deposits embraced in any lease held by such lessee by taking same at the highest price offered by any responsible bidder at public auction and at less than appraised value; and if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate: *And provided*, That nothing herein contained shall be construed as limiting or curtailing the right of any lessee or owner of mineral deposits from acquiring additional surface lands for mining operations as provided by the Act of Congress of February nineteenth, nineteen hundred and twelve: *Provided further*, That no person or corporation shall be permitted to acquire more than four tracts of nine hundred and sixty acres each, except where such person, firm, or corporation has such tracts under existing valid lease.

* * * * *

SEC. 6. That the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules, regulations, terms, and conditions not inconsistent with this Act, as he may deem necessary to carry out its provisions and shall establish an office for such purpose at McAlester, Pittsburg County, Oklahoma.

SEC. 7. That when the full purchase price for any property sold hereunder is paid, the chief executives of the two tribes shall execute and deliver, with the approval of the Secretary of the Interior, to each purchaser an appropriate patent, conveying to the purchaser

the property so sold: *Provided*, That the purchaser of any coal or asphalt deposits shall have the right at any time before final payment is due to pay the full purchase price on said coal and asphalt deposits, with accrued interest, and shall thereupon be entitled to a patent therefor as herein provided.

SEC. 8. That there is hereby appropriated, out of any Choctaw and Chickasaw funds in the Treasury not otherwise appropriated, the sum of $50,000 to pay the expenses of appraisement, advertisement, and sale herein provided for, and the proceeds derived from the sales hereunder shall be paid into the Treasury of the United States to the credit of the Choctaws and Chickasaws.

5. The Commissioner of Indian Affairs (hereinafter sometimes referred to as the "Commissioner") promulgated and prescribed regulations governing the sale of coal and asphalt deposits in the segregated mineral area in the Choctaw and Chickasaw Nations in Oklahoma, which regulations were approved by the Secretary of the Interior September 24, 1918. The pertinent sections of the regulations read as follows:

SECTION 1. The sale of said coal and asphalt shall be conducted under the supervision of the Superintendent for the Five Civilized Tribes, subject to the approval of the Secretary of the Interior.

* * * * *

SECTION 3. The Superintendent for the Five Civilized Tribes shall advertise and sell said coal and asphalt at public auction, to the highest and best bidder, for not less than the appraised value, subject to the approval of the Secretary of the Interior, in accordance with the law and these regulations and when and as directed by the Commissioner of Indian Affairs, but not later than six months from the date of the final appraisement. The sale shall be held at McAlester, Oklahoma, on December 11th, 12th, 13th, and 14th, 1918.

SECTION. 4. Said Superintendent shall, as soon as possible, prepare a list, in pamphlet form, of the tracts of the leased and unleased coal and asphalt to conform to the approved schedules of appraisement, setting forth each tract number, a description of each tract, the number of acres in each tract, the appraised value of each tract, and the description of each tract included in the schedule of appraisement approved by the Secretary of the Interior.

SECTION 5. Said Superintendent shall advertise the sale not less than sixty days; such sale to be advertised

and published in such manner and in such papers and journals as the Commissioner of Indian Affairs may direct.

SECTION 6. All sales to which these regulations apply shall be upon the expressed conditions provided for in Section 4 of said Act of Congress approved February 28, 1918, which reads as follows:

[Section 4 is set forth in finding 4.]

SECTION 7. The terms of the sale shall be 20% of the purchase price in cash at the time of the sale, and the remainder shall be paid in four equal annual payments from date of sale, whether or not any coal or asphalt is mined subsequent to the sale. Where mining operations are carried on a certain amount per ton for coal or asphalt mined shall be paid monthly to the Superintendent for the Five Civilized Tribes to be applied on the purchase price as provided by Section 13 of these regulations. All deferred payments shall bear interest at the rate of 5% per annum.

If default be made in any payment when due, all rights of the purchaser thereunder shall, at the discretion of the Secretary of the Interior, cease, and be thereby extinguished, and the coal and asphalt minerals shall be taken possession of by the Secretary of the Interior for the benefit of the Choctaw and Chickasaw Nations, and any and all money, including interest, paid on the purchase price shall be forfeited to said Nations.

Purchasers shall have the right to pay all of the purchase money or any deferred payment, or any portion thereof, at the time of the sale or at any time before the same is due, interest to be computed to date of receipt of payment.

Should any successful bidder fail to make the first twenty per cent payment at the time of the sale, his bid shall be forthwith rejected and the coal and asphalt shall again be offered for sale in accordance with the law.

* * * * *

SECTION 11. All payments shall be made to D. Budrus, Cashier, unless otherwise directed by the Commissioner of Indian Affairs.

* * * * *

SECTION 13. Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay, or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly,

8 cents per ton for all coal mined (mine run), and 10 cents per ton for asphalt mined, such payments to be held by said Superintendent to be applied on the purchase price, and upon request of the purchaser may be applied in payment of any installment, when due. Any unused advance royalty to the credit of the lessee under existing leases, shall be paid by said Superintendent, when final payment of the purchase price is made, to the purchaser for the benefit of the lessee under the terms of the lease and the Act of Congress approved February 8, 1918: Provided, however, that if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate.

All royalty paid on coal or asphalt mined subsequent to the date of approval of the sale shall belong to the purchaser, subject to the requirement of a certain amount per ton, as above stated, to be paid to the Superintendent of the Five Civilized Tribes, to be applied on the purchase price, which is to protect the Choctaw and Chickasaw tribes from loss on account of coal removed in case the tract should be forfeited before final payment is made.

* * * * *

SECTION 15. Immediately after any sale, schedules of the successful bidders shall be prepared and forwarded to the Commissioner of Indian Affairs for approval or disapproval. The Secretary of the Interior may set aside and vacate any proposed sale for failure of the prospective purchasers to pay any part of the purchase price, or the interest thereon, when same becomes due, or for other good reasons; also in such case to forfeit to the Choctaw and Chickasaw Nations any and all money paid by said prospective purchasers.

SECTION 16. Immediately after the approval by the Secretary of the Interior of the sales in any district each bidder whose bid has been approved shall be furnished with a certificate of purchase describing the tract included in his bid and setting forth the conditions of the sales and the terms upon which payments are to be made and title obtained, and stating until the full purchase price has been paid, all mining operations shall be con-

ducted under the supervision of the said representative of the United States Bureau of Mines and Mining Trustees of the Choctaw and Chickasaw Nations, or such other officer or officers as may be designated by the Commission of Indian Affairs, which certificate of purchase will entitle the purchaser to possession of the coal and asphalt in the tract purchased by him, subject to all of the conditions authorizing the sale thereof, as provided by said Act of Congress, and all of the conditions provided for in these regulations.

SECTION 17. As soon as full and final payment is made for any tract of coal and asphalt sold under these regulations, a patent shall be issued conveying to the purchaser any and all coal and asphalt underlying the entire surface of such tract, subject to all the rights of any lessee or any tract of such coal and asphalt and such patent shall contain a clause or clauses reciting and containing the restrictions, covenants, and conditions under which the property is sold, in accordance with the provisions of Section 4 of said Act of Congress approved February 8, 1918, and Section 3 of said Act of Congress of February 19, 1912.

* * * * *

SECTION 24. The right is reserved to reject any and all bids and to approve or disapprove any and all sales.

6. October 10, 1918, the Superintendent for the Five Civilized Tribes issued a printed advertisement of the sale, entitled "Auction Sale of Coal and Asphalt Deposits, Leased and Unleased in the Choctaw and Chickasaw Nations, Oklahoma, by the United States Government," which set forth the terms of sale as follows:

> TERMS: Twenty percent in cash at time of sale and the balance in four equal installments payable in one, two, three, and four years from date of sale, with interest at five percent per annum on deferred payments. Purchasers can make full payment at time of sale or at any time before the deferred installments become due.

The Superintendent for the Five Civilized Tribes also issued an advertisement of the sale in printed pamphlet form, identically entitled, which set out the terms of sale as follows:

> TERMS: Twenty percent (20%) of the purchase price at the time of the sale, and the remainder in four equal annual installments, payable in one, two, three, and four

years, respectively, from the date of sale. All deferred payments bear 5 percent (5%) interest per annum from date of sale. All royalties on tracts now under lease, and on any lease made on unleased tracts subsequent to the sale and before final payment, must be paid to the Superintendent for the Five Civilized Tribes and be held by him and paid to the purchasers after full payment has been made or in annual installments in the discretion of the Secretary of the Interior.

All sales made shall be upon the express conditions provided for in Section 4 of the Act of Congress approved February 20, 1918. [The Act of Congress referred to is set out in finding 4.]

7. December 11, 1918, at McAlester, Oklahoma, the Superintendent for the Five Civilized Tribes offered for sale at public auction the leased and unleased coal deposits in the segregated mineral area of the Choctaw and Chickasaw Nations of Oklahoma. The Railroad was the highest bidder, at not less than the appraised value, for each of the tracts of coal deposits, developed and undeveloped, upon which it had leases and also the highest bidder, at not less than the appraised value, for the two unleased tracts of coal deposits Nos. 5A and 5B.

On the same day the Railroad's bids were accepted by the Superintendent for the Five Civilized Tribes, and shortly thereafter, during December 1918, forwarded to the Secretary of the Interior for approval.

The bids of the Railroad for these tracts of coal deposits, both leased and unleased, amounted to $526,073.50, twenty percent of which ($105,214.70) was paid by the Railroad on the day of the auction sale. Leases held by the Railroad covering the tracts of coal deposits purchased at the auction sale were for a term of thirty years commencing February 21, 1899, and ending February 20, 1929.

8. The sale of the leased and unleased coal deposits to the Railroad by the Superintendent for the Five Civilized Tribes was approved by the Assistant Secretary of the Interior August 29, 1919.

9. Between December 11, 1918, the date the tracts of coal deposits were sold at public auction, and August 29, 1919, the date the sale was approved by the Assistant Secretary of

the Interior, the Railroad paid the sum of $35,193.14 as production royalties for coal mined from the developed tracts of coal deposits, heretofore referred to.

10. December 5, 1919, the Railroad forwarded to the Superintendent for the Five Civilized Tribes a warrant for the sum of $109,057.60 in favor of D. Buddrus, Cashier, in payment of the second installment on the purchase price of the several tracts of coal deposits, including interest. In determining the sum so paid the Railroad deducted from the amount of the second installment upon the purchase price of the coal deposits the sum of $17,200, such amount being one-half of the advance royalties theretofore paid upon the undeveloped leases. That payment was received by the Superintendent and credited to the Railroad on December 11, 1919.

11. January 25, 1920, the Superintendent for the Five Civilized Tribes issued certificates of purchase to the Railroad covering each of the several tracts of coal deposits purchased by it on December 11, 1918. These certificates recited that the Railroad had paid forty percent of the purchase price. Pertinent parts of these certificates read as follows:

> The balance of the purchase price is to be paid by the purchaser in four equal annual installments payable in one, two, three, and four years, respectively, from date of sale; all deferred payments to draw interest at the rate of 5% per annum, payable annually, from date of sale. All or any part of the purchase money may be paid at any time before due, interest to be computed to date of payment.
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> * * * * *
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> That the said purchaser is entitled to the immediate possession of the coal and asphalt mineral in, upon, and underlying the surface of said lands, but no mining operations shall be conducted until the full purchase price is paid under penalty of forfeiture of all rights under such purchase and all sums paid thereunder, except under the supervision of the representatives of the United States Bureau of Mines and Mining Trustees of the Choctaw and Chickasaw Nations or such officer or officers as the Commissioner of Indian Affairs may designate, and in accordance with existing laws and Department rules and regulations governing the leasing of the segre-

gated coal and asphalt in said Nations. Until full payment is made all royalties shall be paid to the Superintendent for the Five Civilized Tribes to be held by said Superintendent to be applied upon the purchase price.

12. April 10, 1920, the Superintendent for the Five Civilized Tribes advised the Railroad that he was in receipt of instructions from the Assistant Secretary of the Interior, under date of March 26, 1920, "to charge interest only from the date of the approval of the sale and in all cases where interest has been paid for the period during which the sale was pending, to credit such interest on the purchase price of the coal and asphalt deposits," and that in compliance therewith he had that day credited on the purchase price of the tracts purchased by the Railroad, the excess payment of interest made December 11, 1919, on the unpaid principal from the date of sale, December 11, 1918, to August 29, 1919, in the total amount of $15,080.75.

13. December 9, 1920, the Railroad forwarded to the Superintendent for the Five Civilized Tribes, warrant in the sum of $82,834.51 in favor of D. Buddrus, Cashier, in payment of the third installment of the purchase price of the several tracts of coal deposits, including interest. In determining the sum so paid the Railroad deducted from the amount of the third installment of the purchase price of the deposits the sum of $9,460.25. That sum represented the portion of the remaining one-half of the advance royalties on undeveloped leases amounting to $17,200, which was credited against the production royalties for January and February 1920. The payment was received by the Superintendent and credited to the Railroad on December 10, 1920.

In making that payment upon the purchase price the Railroad advised the Superintendent that it contended the same was an operpayment of such installment on the ground that the sale was effective on the date the first installment was paid at McAlester, Oklahoma, and that the purchaser should have credit for all sums paid as royalties subsequent to that date and should pay interest on deferred payments from that date.

14. December 3, 1921, the Railroad forwarded to D. Buddrus, Cashier for the Five Civilized Tribes, voucher in his

favor for $90,449.56, in payment of the fourth installment of the purchase price of the several tracts of coal deposits, including interest. That payment was received by the Superintendent for the Five Civilized Tribes and credited to the Railroad on December 5, 1921.

In making that payment the Railroad advanced the same contention with respect to an overpayment as made in connection with its payment of December 9, 1920, set out in finding 13.

15. December 6, 1922, the Railroad forwarded to the Superintendent for the Five Civilized Tribes voucher for the sum of $69,244.26 in favor of D. Buddrus, Cashier, in final payment of the purchase price of the several tracts of coal deposits, including interest. That payment was received by the Superintendent and credited to the Railroad December 11, 1922.

At the time the Railroad made that final payment on the purchase price it did so under written protest and notified the Superintendent not to disburse the payment in any manner but to hold the entire payment in his care until such time as the Department of the Interior or the courts might finally determine the rights of the parties. The protest was made in letters dated December 6 and December 11, 1922, which, with the voucher in payment of the final installment, were delivered at the same time to the Superintendent. The letter of December 6, 1922, read in part as follows:

> It is our further contention that we are entitled to a credit and refund of $20,078.96, being the amount of advanced royalties on *developed* leases standing to our credit on December 11, 1918. The Act provides, under Section 4, "and any residue of advanced royalties heretofore paid by any leases shall be credited to such leases on account of any production of coal on any other lease which he may own or operate," the words "any residue of advanced royalties" apply not only to the advanced royalties on *undeveloped* leases but also to the advanced or residue of royalties on *developed* leases, and we should therefore receive credit for the same on the purchase price of these coal deposits.
>
> I am calling these matters to your attention at this time in order that you may be fully informed of our claims, of which you have heretofore been advised both

by letter and verbally by my representative, so that you will take no action in disbursing the enclosed payment in a manner which will in any way impair our right to recover the same should we be so entitled, it being my understanding that the Commission does not have authority to make refunds on amounts once deposited or disbursed to the credit of the Choctaw and Chickasaw Nations, and the sums we claim should be refunded, and are paid under protest, and should be held by you in escrow. If you desire, I shall be glad to have a representative call on you and explain our contention and claims in detail at any time and place you may care to designate.

The letter of December 11, 1922, read in part as follows:

It is our contention that our rights and yours were fixed and vested as of the date of sale and that we should pay interest from that date on deferred payments and have credits for all royalties from said date and that the accumulations from royalties should be distributed among the leases and applied to our credit as provided by the Act of Congress then in effect.

This then is to again notify you that this money is paid under protest and not the [to?] disburse the same in any manner, but to hold the same in your care until such time as the Department or the Courts may finally determine the rights of the parties.

16. September 25, 1923, the Assistant Secretary of the Interior authorized the Superintendent for the Five Civilized Tribes to issue patents in the name of the Rock Island Improvement Company for the tracts of coal deposits purchased by the Railroad in accordance with resolutions adopted by the Board of Directors of the two companies requesting the same. The principal chief of the Choctaw Nation and the Governor of the Chickasaw Nation issued patents to the Rock Island Improvement Company for each of the tracts of coal deposits purchased by the Railroad, which patents were approved by the Secretary of the Interior January 24, 1924.

17. In addition to the facts heretofore shown in regard to the Railroad's claim, the following correspondence was had and action taken between December 8, 1919, and October 14, 1932, inclusive:

(a) December 8, 1919, the Railroad was advised by its representative, R. A. Husted, that under the provisions of Section 4 of the Act approved February 8, 1918, the Railroad was allowed to deduct from the purchase price one-half of the advance royalties on the undeveloped leases amounting to $17,200; that the other one-half of the advance royalties on these undeveloped leases and the residue of advance royalties on the developed leases, a total of $37,278.96, might then be credited on the accrued royalties of eight cents a ton of production. He further stated that the Superintendent for the Five Civilized Tribes advised him that the application of accrued royalties in payment of any of the installments of the purchase price was under consideration by the Secretary of the Interior, and that until instructed by the Secretary, his office had no authority to deduct any royalties from the installments on the purchase price, but that such installments should be paid in full, plus interest on the deferred payments.

(b) December 10, 1919, the Assistant Secretary of the Interior advised the Superintendent for the Five Civilized Tribes that the sale of the coal and asphalt deposits was not complete until approved by the Secretary and that all royalties due prior to that date belonged to the Choctaw and Chickasaw Tribes.

(c) February 21, 1920, the Railroad was advised by its representative, R. A. Husted, that on February 18th and 19th he conferred with the office of the Superintendent for the Five Civilized Tribes relative to the application of advance and production royalty on the purchase price of said tracts of coal deposits. He reported: (1) The Superintendent's office agreed that the Railroad was entitled to apply one-half of the advance royalties on the undeveloped leases amounting to $17,200 in part payment of the purchase price thereof, as was done by the Railroad in making payment of the second installment thereon. (2) The Superintendent's office agreed that the remaining one-half of the advance royalties on the undeveloped leases amounting to $17,200 should be credited on the monthly royalties to be paid on any of the developed leases on account of the production of coal and to credit the same on the purchase price of such

developed leases. (3) The Superintendent's office was willing to apply the unused advance royalties on one developed lease in payment of the monthly production royalty on that particular lease and hold the money until final payment was made and then pay it to the purchaser, but would not credit the same on the installments of the purchase price until authorized to do so by the Secretary of the Interior. (4) The Secretary of the Interior had ruled that the royalties paid on production between December 11, 1918, the date of sale, and August 29, 1919, the date the sale was approved by the Secretary of the Interior, could not be applied on the purchase price.

(d) December 11, 1922, the Superintendent wrote the Railroad relative to its final payment on the purchase price and advised it that in connection with its protest concerning the credit for advance royalties from the date of sale, the Department at Washington, D. C., had held that credit for royalties should commence on the date of approval of same, as the Railroad was not required to pay interest from the sale up to the date of the approval.

(e) December 16, 1922, the Superintendent advised the Railroad that on December 10, 1919, the Secretary of the Interior had held that the sale of any tract of coal and asphalt minerals was not complete until approved by the Secretary and any royalty on production due under the lease prior to the date of the approval of the sale belonged to the Choctaw and Chickasaw Tribes and any amount subsequent to that date belonged and should be paid to the purchaser. He also advised the Railroad that its contention that it was entitled to the credit and refund of $20,078.96 of advance royalties on developed leases standing to its credit on December 11, 1918, would be given due consideration. He further stated that his office was of the opinion that the interest on the purchase price should begin on the date of sale, but that the Department held that it should begin on the date of the approval of the sale instead, and that this action was taken upon protest, having been filed by numerous coal lessees who claimed that the interest payments should not begin until the date of the approval of the sales.

(f) December 21, 1922, the Superintendent wrote the Railroad that pending final decision of its claim for credits of royalties on production from December 11, 1918, to August 29, 1919, he was listing for the Railroad's information the distribution of the final payment to the several tracts in the amounts therein set forth in order that the railroad might have a receipt for the payment.

(g) January 16, 1923, the Superintendent wrote the Railroad for certain statements for the purpose of submitting the same to the Secretary of the Interior for appropriate action on the Railroad's protest.

(h) December 4, 1923, the Acting Superintendent wrote the Commissioner referring to him for appropriate action the application of the Railroad for a refund of (1) production royalties paid between December 11, 1918, the date of sale, and August 29, 1919, the date of the approval of the sale by the Secretary of the Interior, and (2) the amount of advance royalty on developed leases standing to the credit of the Railroad on December 11, 1918. In that letter the Acting Superintendent recommended to the Commissioner that these two claims be denied.

(i) September 29, 1927, the attorney for the Railroad at Washington, D. C., wrote the Commissioner requesting that he be advised as to what action had been taken in connection with the Railroad's claims.

(j) October 12, 1927, the Commissioner advised the Railroad's attorney at Washington, D. C., that at first it was administratively determined that the date of the approval of the sale by the Secretary was the controlling date, but later, on further consideration, it was held that the approval by the Secretary related back to the date of sale, thus making that date the effective date of purchase.

(k) November 2, 1927, the Railroad's attorney at Washington, D. C., wrote the Commissioner that his letter of October 12, 1927, indicated that the Railroad was entitled to recover both the advance royalty standing to its credit on December 11, 1918, and the production royalties between the date of sale and the approval thereof by the Secretary, and, in view thereof, it was requested that he consider the matter further and advise of his action thereon.

(l) November 17, 1927, the Commissioner wrote the Railroad's attorney that its claims had been denied and enclosed copy of his letter to the Secretary recommending that the claim for reimbursement be denied, which letter was approved by the Secretary November 15, 1927.

(m) November 19, 1927, the Commissioner transmitted to the Superintendent for the Five Civilized Tribes his original letter dated November 11th, and approved November 15, 1927, denying the Railroad's claims for refund and credit for advance royalties and directed the Superintendent to advise the interested parties of the action taken as evidenced by that letter.

(n) November 25, 1927, the Railroad's attorney at Washington, D. C., wrote the Commissioner requesting a statement showing the application of the advance royalties on the undeveloped leases. This request was complied with by the Commissioner December 1, 1927.

(o) December 5, 1927, the Superintendent wrote the Railroad that his office had been directed to notify it that its claim for refund and credit for advance royalty had been refused in accordance with the Commissioner's letter of November 11, 1927.

(p) December 8, 1927, the Railroad wrote the Superintendent acknowledging receipt of his letter of December 5th and advising him that the Railroad had not abandoned either the claim for refund of advance royalty or the claim for refund of production royalties.

(q) December 13, 1927, the Railroad's attorney at Washington, D. C., wrote the Commissioner making claim for the refund of production royalties between December 11, 1918, and August 29, 1919.

(r) October 13, 1928, the Commissioner wrote the Railroad's attorney at Washington, D. C., that after careful consideration of the matter no reason was seen for changing the conclusion reached in his letter dated November 11th and approved November 15, 1927, regarding the claims.

(s) June 13, 1929, the Commissioner wrote the Superintendant that the opinion of Acting Attorney General William D. Mitchell, rendered July 15, 1927, in the claim of Pierce Coal Company, ruling that the provision in section 13

of the regulations authorizing the payment to purchasers of advance royalties standing to the credit of the lessee was void because there was no authority in the act for such a disposition of the royalties paid under the leases, should be used in settling with the coal lessees and that the matter should have prompt attention.

(t) June 27, 1929, the Acting Superintendent wrote the Commissioner that there were several distinct phases involved in the sale of the coal and asphalt deposits and that each one of the various cases which had been submitted to the Commissioner had a different phase from that considered by the Acting Attorney General in his opinion of July 15, 1927.

He further advised that from a consultation with the tribal attorneys it appeared that they and the lessees were unwilling to accept the opinions of the Department and the Assistant Attorney General, and were of the opinion that the Commissioner's office should instruct the Department of Justice, or give them permission, to select a typical case among the purchasers, involving the different phases mentioned, and to institute a friendly suit to determine the meaning of the Act of Congress of 1918 in reference to the sale of coal deposits. He further stated that his office believed this to be the only feasible solution of the difficulty, and he respectfully recommended that the Department of Justice be instructed to institute such a suit after conferring with the tribal attorneys.

(u) October 27, 1930, the Acting Superintendent advised the Railroad that its final payment of December 11, 1922, on coal deposits in the amount of $69,244.26 had been held in the suspense files since that date and the matters in controversy had not been determined either by the Department or the courts and that the Choctaw and Chickasaw tribal authorities were very anxious to close this account and had asked that he either credit this money to their account or that the Railroad be requested to take some definite action that would adjudicate the matter.

(v) November 3, 1930, the Railroad wrote the Acting Superintendent relative to its claims and stated that the settlement with Kala Inla Coal Company was directly in line with

its protest, and that it seemed the Railroad's claims should be settled on the same basis.

(w) November 6, 1930, the Acting Superintendent wrote the Railroad that the Commissioner on January 5, 1924, directed his office to make settlement with the Kala Inla Coal Company, but this was not done, for the reason that the tribal attorneys objected and asked for further time in which to file briefs and to have the question submitted to the Attorney General of the United States for an opinion. He further advised that the Attorney General had not rendered an opinion, although he had been assured one would be had by October 1, 1930.

(x) November 20, 1930, the Acting Superintendent wrote the Commissioner that on November 15, 1930, during the hearing before the Senate Committee investigating Indian affairs, the tribal officials directed attention to the sale of the coal deposits and to the claim of the Railroad which had been pending for the past eight years, involving two points: That the tribal officials insisted that the Superintendent's and the Commissioner's offices had both been derelict in the discharge of their duty in not adjudicating the issues involved previous to that time; that the tribal attorney for the Choctaws complained to the Senate Committee that an opinion from the Attorney General had been promised him by October 1, 1930, but none had been furnished; and that for eight years the matter had been allowed to drag along without any action and that action was desired. The Acting Superintendent recommended that the Department of Justice be required to take such appropriate action as to determine the issues involved.

(y) November 30, 1931, the Attorney General ruled that the Kala Inla Coal Company was not entitled to credit on the purchase price for royalties paid under a preexisting lease between the date the auction sale was held and the date the Secretary of the Interior approved the Company's bid.

(z) October 14, 1932, a meeting was called by the Superintendent at McAlester, Oklahoma, at which were present the Superintendent, the Governor of the Chickasaw Nation, the attorney for the Chickasaw Nation, the Mining Trustee, the District Mining Supervisor, the attorney for the Choctaw Nation, and others. At that time it was decided to give the

Railroad notice of the Attorney General's opinion and fifteen days to show cause why the money held in escrow should not be deposited to the credit of the Choctaw and Chickasaw Nations.

18. December 12, 1932, the Superintendent for the Five Civilized Tribes wrote the Railroad as follows:

> On December 11, 1918, the Choctaw, Oklahoma & Gulf Railroad Company purchased mineral deposits under certain tracts of the segregated land of the Choctaw and Chickasaw Nations. Some payments were made on these tracts, and under date of December 6, 1922, the Chicago, Rock Island & Pacific Railway Company forwarded to this office a check for $69,244.26, representing the full and final payment of the purchase price of your mineral tracts and interest thereon. You stated, however, that the deposit was made under protest and subject to the following reservations:
>
> > 1. Your company claimed a credit of $35,193.14 on production royalties from December 11, 1918, to August 29, 1919, and asked for a refund of the same out of the payment of $69,244.26.
> > 2. Your company claims a refund of $20,078.96, being the amount of advance royalties on developed leases standing to your credit on December 11, 1918.
> > 3. The proper disposition of the "residue of advance royalties" on undeveloped leases as provided in the Act of Congress.
>
> You asked that the money so deposited be held in escrow and not deposited to the credit of the Choctaw and Chickasaw Nations until all the disputed questions set forth should have been adjudicated.
>
> Under date of November 30, 1931, the Attorney General for the United States rendered an opinion relative to royalties accruing and deposited between the date of auction and the date of approval of the sale, which opinion holds that the royalties between said two dates belonged to the Choctaw and Chickasaw Nations. A copy of the opinion is enclosed herewith.
>
> In accordance with said decision, the amount in controversy will be deposited to the credit of the Choctaw and Chickasaw Nations sixty days from this date.

19. November 3, 1934, the Superintendent for the Five Civilized Tribes advised the Commissioner at Washington, D. C., by radiogram, that the entire amount of the final

payment on the purchase price of the coal deposits purchased by the Railroad was still held in escrow at his office.

June 25, 1936, D. Buddrus, Cashier, and Special Disbursing Agent in the office of the Superintendent for the Five Civilized Tribes, advised the Attorney General of the United States that on December 11, 1922, he had taken up the remittance from the Railroad on his official receipt in the amount of $69,244.26; that the advice accompanying the remittance stipulated that it should not be disposed of but held pending outcome of litigation instituted, and that consequently that remittance was taken up in his special deposit account and placed on deposit with the Treasurer of the United States, subject to his check. He further stated that, since he had not been advised at any time since the above date that the money was ready for disposition, the amount was still held in his special deposit account with the Treasurer of the United States, termed "Trust Funds," and that the sum was subject to his check at any time, and upon the necessary court instructions would be either returned to the remitters or placed to the credit of the United States for the benefit of the Choctaw and Chickasaw Tribes of Indians.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This suit is brought by the trustees in bankruptcy of the Choctaw, Oklahoma & Gulf Railroad Company (hereinafter referred to as the Railroad) to recover from the United States alleged overpayments on the purchase price of coal deposits in lands owned in fee by the Choctaw and Chickasaw Nations.

Under the authority of an act of June 28, 1898, 30 Stat. 495, the mining trustees of the Choctaw and Chickasaw Nations leased to the Railroad for a period of thirty years beginning February 21, 1899, several developed and undeveloped tracts of coal deposits in the segregated mineral area of the Choctaw and Chickasaw Nations. Each tract was covered by a separate lease. Each lease provided for the payment as royalty on the production of all coal mines developed on the tract a stipulated sum for every ton of coal produced; each lease also provided that the lessee should pay on each mine or

claim, developed or undeveloped, within the tract covered by the lease, a certain amount each year as advance royalty, on the understanding that such payments would be credited on royalty when the mine was developed and operated and its production was sufficiently large that the production royalties exceeded the advance payments.

By an act approved February 8, 1918, 40 Stat. 433, Congress authorized the Secretary of the Interior to sell at public auction the coal and asphalt deposits, leased and unleased, in the segregated mineral area of the Choctaw and Chickasaw Nations and to make all necessary regulations for the sale. With reference to the lands on which there were leases, the act provided that such lands should be sold subject to all rights of the lessee, that advance royalty paid by any lessee and standing to his credit should be credited by the purchaser to the extent of the amount thereof and that no royalty should be paid to the purchaser by the lessee until the advance royalty was exhausted at the rate of eight cents per ton mine run. After giving the lessee a preferential right to purchase the coal deposits embraced in any lease held by him by paying the highest price offered by any responsible bidder if the bid price was not less than the appraised value, the act went on to provide that "if any lessee becomes the purchaser of any coal deposits on any undeveloped lease owned by him, then one-half of the advance royalties paid by any lessee on such lease shall be credited on the purchase price thereof, and any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate."

Up to the time that the lands were offered for sale at auction, December 11, 1918, the Railroad had paid total advance royalties of $125,929.64 on the developed leases. Of this amount, $105,845.68 had been credited against the royalties for the production of coal, leaving an unused balance of $20,078.96. The advance royalties on the undeveloped tracts paid during the same time amounted to $34,400.

The auction sale of the lands was held December 11, 1918, under the supervision of the Superintendent of the Five Civilized Tribes. The Railroad bid on all the tracts on which it had leases, developed and undeveloped, and its bids were

accepted by the Superintendent and forwarded to the Secretary of the Interior for his approval. The total amount of its bids was $526,073.50. The act and regulations required a down payment of twenty percent, the remainder to be paid in "four equal annual installments from the date of the sale," all deferred payments to bear interest at the rate of five percent and to mature before "the expiration of four years after the date of such sale."

The Railroad's bids were not approved by the Secretary of the Interior until August 29, 1919, and between that time and the time that the sale was held, the Railroad had paid production royalties under its leases amounting to $35,193.14.

Plaintiffs' first claim relates to these (production) royalties. They contend that the royalties paid between December 11 and August 29 should have been credited on the purchase price on the theory that the sale was effective from December 11, 1918, with interest on the deferred payments running from that date. The Railroad had paid interest from December 11, but the Secretary ruled that interest should run from the date of the approval, August 29, 1919, and directed the Superintendent to credit on the purchase price interest paid before that date. The Railroad protested. Plaintiffs here, of course, have reduced their claim as to the application of production royalties to the extent of the credit for interest allowed the Railroad at that time.

We cannot agree with plaintiffs that the sale was effective as of December 11, 1918. The act itself sheds little light on the problem. It authorized the Secretary to prescribe the necessary rules and regulations for the sale, and it seems clear from the regulations that any sale was to be only tentative until the approval of the Secretary had been obtained. Section 1 authorized the Superintendent of the Five Civilized Tribes to hold the sale, subject to the approval of the Secretary of the Interior. Section 3 gave the Superintendent authority to sell to the highest and best bidder, subject to the approval of the Secretary. Section 15 directed that immediately after any sale schedules of successful bidders should be prepared and forwarded to the Commissioner of Indian Affairs for approval or disapproval. Section 16 provided that after the approval of any bid the bidder should be furnished

with a certificate of purchase describing the tracts and setting forth the terms on which title could be obtained; the certificate was to entitle the purchaser to possession. If a successful bidder was not entitled to possession until his bid had been approved, the continued possession of the Railroad must have been as lessee, under the terms of the lease and subject to the burdens of the lease, one of which was the payment of royalty.

The only reference in the regulations to the payment of royalties to the purchaser is found in section 13, which provided that all royalty paid *subsequent* to the date of approval should belong to the purchaser. It must have been intended that royalty paid before that time was to continue to be paid to the superintendent for the benefit of the Indian owners. Consistent with these regulations was the decision to charge interest on the deferred payments from the date of the Secretary's approval of the bids.

Plaintiffs rely upon cases of conveyances by individual Indian owners where the approval of the Secretary of the Interior was required, and, when given, was held to relate back to the date of the deed, making the conveyance effective as of that time. But the danger of injustice to a purchaser for value because of an intervening change in circumstances, evidently a reason for those decisions (see *Lykins* v. *McGrath*, 184 U. S. 169), is not present here, and in view of the provisions of the regulations there is no sufficient reason for the application of the doctrine of relation back in this case.

When the Railroad paid its second installment on the purchase price December 5, 1919, it deducted therefrom the sum of $17,200, one-half of the amount of the advance royalty standing to its credit on the undeveloped leases at the time that the auction sale was held. The payment was received by the superintendent and credited to the Railroad.

When the third installment became due, the Railroad deducted from the amount due the sum of $9,460.25, the amount of its production royalties due for January and February 1920, though it had not, in fact, paid those royalties. Its reason for making this deduction was that it claimed the right to credit the remaining one-half of the $34,400 advance royalty on the undeveloped leases against production royalty, and its deduction was in partial execution of that claim. The

defendant's agent consented, at that time, to this deduction. Since the Railroad was now in possession of the tracts as purchaser, the production royalties it was required to pay were in fact not those of a lessee but royalties required of all purchasers under Regulation No. 13 which was as follows:

> Until full and final payment is made for any tract, leased or unleased, sold under these regulations, the purchaser shall pay or cause to be paid to the Superintendent for the Five Civilized Tribes, monthly, 8 cents per ton for all coal mined * * *, such payments to be held by said Superintendent to be applied on the purchase price and, upon the request of the purchaser, may be applied in payment of any installment when due.

We show hereinafter that the Railroad had no right to make the deduction of $9,460.25.

The Railroad paid the full amount of its remaining two installments under protest, demanding credit on the purchase price of all the advance royalty standing to its credit on the developed leases on December 11, 1918 ($20,078.96), and the balance of the advance royalty on the undeveloped leases remaining after the two credits allowed ($7,739.75). It also asked, as we have seen above, credit for production royalties paid between December 11, 1918, and August 29, 1919, which, deducting the credit allowed for interest paid during that time ($15,180.75), amounted to $20,112.39, making a total claim for $47,931.10. After more than a decade of correspondence between the Railroad and the Interior Department, the claim was finally rejected December 12, 1932.

There is nothing in the act of 1918 to support plaintiffs' claim that the residue of advance royalty should have been applied to the purchase price. The only provision in the statute relating to credits on the purchase price in favor of the lessee is that in section 4, giving the lessee who purchased the coal deposits in any undeveloped lease held by him credit on the price to the extent of one-half of the advance royalty paid on such lease. The Railroad was given that credit in making its second payment. From the committee hearings and debates on the bill which became the Act of February 8, 1918, it is clear that that was the only credit on purchase price intended to be allowed the lessees. See 64th Congress, Hear-

ings before a Subcommittee of the Committee on Indian Affairs on H. R. 12544, part 3, p. 101–126; 56 Congressional Record, part 1, p. 209. In fact, that provision was a compromise by the Committee between the desires of the lessees, who wanted credit for all the advance royalty, and the representatives of the Tribes, who objected to the allowance of any credit, claiming that the advance royalty should be regarded as the price paid by the lessee for the exclusive possession of the land and the power to keep it from competitors.

The act fully protected the lessee where the land was bought by a third party. Such a purchaser was required to give the lessee credit for all advance royalties paid and standing to his credit and the lessee was not to pay royalty until that credit was exhausted. That factor must have been taken into consideration by the purchaser in fixing the amount of his bid. There was no provision in the act for turning over the advance royalty to the purchaser (see 35 Op. A. G. 259, ruling void a section of the regulations that authorized payment of the advance royalty to the purchaser for the benefit of the lessee).

The act permitted the lessee to shift credits from one lease to another. When the leases were made, each tract was covered by a separate lease and each lease was independent of any other; advance royalty on any one lease could not be credited against production royalty on any other. Section 4 of the act, after allowing the lessee credit of one-half of the advance royalty on any undeveloped lease owned by him, provided that "any residue of advance royalties heretofore paid by any lessee shall be credited to such lessee on account of any production of coal on any other lease which he may own and operate." This provision would permit a lessee who held both developed and undeveloped leases to transfer the credit for advance royalty on the undeveloped lease, which the act provided that he was not to lose, to an operating lease, to be credited on production royalty by the purchaser. But it could by its terms apply only where the lessee of the undeveloped lands continued to operate on some other lands as lessee.

Plaintiffs would have this provision mean that the residue of advance royalty could be applied to the production royal-

ties which the Railroad, like all other purchasers, was required to pay as a security for the ultimate payment of the purchase price, and then credited against the purchase price. The difficulty is that the act reads "shall be credited on account of any production of coal on any other lease which he may own and operate." Here the Railroad no longer owned any leases and it had received all the credit on the purchase price because of advance royalty to which the act entitled it.

Since, in the view which we have taken of the merits of plaintiffs' claim, they are not entitled to recover, it is unnecessary to consider, and we do not decide, the questions as to whether the defendant is properly subject to suit, and as to whether the statute of limitations has run. We conclude, therefore, that the petition must be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

STEEL UNION-SHEET PILING, INCORPORATED, v. THE UNITED STATES

[No. 43339. Decided May 5, 1941]

On the Proofs

Patent for "Method of Making Piles"; invalid for lack of invention.—On the report of the commissioner showing that the patent in suit, No. 1,698,678, is invalid for lack of invention, and upon abandonment of the prosecution, plaintiff's petition was dismissed.

The Reporter's statement of the case:

Mr. Ray T. Ernst and *Knight Brothers* for the plaintiff.
Mr. Titian W. Johnson, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Frank H. Harmon* was on the brief.

The court made special findings of fact as follows:

1. On April 20, 1925, Arthur Mauterer filed application for letters patent in the United States Patent Office entitled "Method of Making Piles" which eventuated into the patent

in suit No. 1,689,678, issued October 30, 1928.

2. By an instrument in writing dated May 4, 1931, Arthur Mauterer assigned the entire right, title, and interest in and to said patent to Sheet Piling, Inc., a corporation of New York, recorded in the United States Patent Office, Liber X–148, page 76.

Thereafter on or about September 19, 1935, Sheet Piling, Inc., by legal authority changed its name to Larssen Piling Corporation, which change of name was recorded in the United States Patent Office, October 31, 1935, Liber U–164, page 306.

On October 15, 1935, Larssen Piling Corporation, by an instrument in writing, assigned the entire right, title, and interest in and to patent No. 1,689,678 to Arthur Mauterer, together with all rights for past infringements, recorded in the United States Patent Office October 31, 1935, in Liber U–164, page 243.

On October 17, 1935, by an instrument in writing, Arthur Mauterer assigned the entire right, title, and interest in said patent No. 1,689,678, together with all rights of action for past infringements to Steel Union-Sheet Piling, Inc., the plaintiff in this suit. This assignment was recorded in the United States Patent Office, October 31, 1935, in Liber U–164, page 245. Copies of the various assignments, plaintiff's exhibits 2, 3, 4, 5, are hereby made a part of this finding.

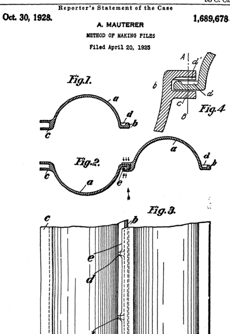
3. The patent in suit covers a "Method of Making Piles" and also for the specific type of pile disclosed as an article of manufacture. The inventor states at considerable length the objects and advantages of his construction, page 1 of the specification, lines 1 to 78.

> This invention relates to the building of walls of iron piles. For the production of walls of this kind a great variety of types of rolled piles of various cross sections have been proposed, all of which, however, have serious disadvantages. Piles with a sickle-shaped or **S**-shaped cross section are also known. Piles with a double-curved or **S**-shaped cross section are difficult to roll. Piles with a single-curved or sickle-shaped cross section frequently do not offer sufficient resistance to lateral bending stresses and are particularly difficult to

ram in large lengths, this being largely due to the tendency of a pile that is being driven to pull an adjacent pile down with it.

The object of the present invention is to produce a pile which can be easily rolled like a pile with a sickle-shaped cross section but which at the same time offers greater resistance to lateral bending stresses. Furthermore, a pile constructed according to the present invention, can be rammed in as readily as one having an **S**-shaped cross section. This is accomplished by making the piles of two parts of sickle-shaped cross section and joining these parts together so as to form an **S**-shaped pile before it is rammed in. The two sickle-shaped pile elements are formed at their edges with interlocking members that are caused to interlock by the application of lateral forces. It has been found that bi-part piles produced in this manner have excellent ramming properties. Thus piles having a full-wave cross-section have two properties which render them superior to those which are provided with a half-wave cross-section. In the first place, the former has double the inertia of the latter. In the second place the resistance offered by the medium in which the piles are driven, is doubled for the former as compared to the latter while the sliding friction between a previously-driven pile and one in process of being driven, is substantially the same for piles of both types. It is in connection with these properties that the advantages to be derived by the hereinafter described method of making piles with cross-sections of compound curvature, will be apparent, I have found that a very advantageous form of bi-part pile is produced by providing the interlocking edges of the parts with projections or protuberances which assist the frictional forces at the joint in preventing the parts of the bi-part pile from being displaced relatively to each other during the ramming operation.

4. The patent in suit, Figs. 1 and 2, provides a unit of sickle-shaped metal a, one extremity of which indicated by c is an open claw, the other extremity or edge b is described as a protuberant part or rib. A complemental sickle-shaped pile member indicated in Fig. 2, on the right-hand side of this figure, by a, is shown in which the edge e is designed to grip the lateral rib b of the other pile member, and also engage the transverse projections d of the first mentioned pile member. This engagement of the two pile members



a, Fig. 2, is not merely a frictional interlock, but is accomplished by hammering together the two parts with a pneumatic hammer or the application of other lateral force. The small arrows, shown in Fig. 2 at the point of interlock, indicate the direction and application of the extraneous force necessary to unite the two sickle-shaped half-wave sections of the completed full-wave pile. Fig. 4 shows the

claw c with the recess d at the edge of one pile section surrounding the projecting locking ribs d of the second pile section.

In this figure 4 no external pressure has been applied; the two pile sections are not in interlocked or positive relationship.

Turning to Fig. 3, which is a side view of the two half waves in locked relation, d indicates the projecting locking ribs on the left half-wave pile, e the edge of the complemental right-hand pile crimped over the locking ribs d, and the protuberant edge b of the left-hand pile section.

5. Engineers have long recognized the virtue of forming piles of oppositely disposed trough shapes or curved sections. Variously they are termed **S**-shaped, double-curved, or full-wave piles. Their properties are well known to those skilled in the art, and the advantages in their use as contrasted to piles presenting a flat or plane surface is a matter well understood.

The superiority of the oppositely disposed sections or **S**-shaped piles lies in their increased resistance to lateral forces or their inherent ability to remain rigid and unbending when pressure is applied to one side of their faces.

In the engineering nomenclature of this art of sheet piling the terms "section modulus," "neutral axis" are used to express certain physical characteristics of piles. "Section modulus" of a pile is simply a measurement of the ability of the particular pile to resist bending action. It is a measure of the stiffness of a pile to resist thrust or pressure at right angles to its vertical axis. This quality of stiffness or the amount of pressure necessary to bend the pile differs with each different design of pile, thus a pile with a high section modulus is more efficient and remains more nearly static than a pile of low section modulus, when the same lateral force is applied. A pile of twice the section modulus of another pile is twice as resistant to lateral force or in other words double the lateral force or pressure would be required to bend the former as the latter.

6. The consideration of and the determination of the section modulus of a beam, sheet pile, or any structural element is exceedingly important, as the load to be carried and with-

stood by the beam or pile defines the degree of section modulus, i. e., the required strength of the element, to support the work load. This is elemental in engineering experience long prior to the date of the patent in suit.

When sufficient lateral force is applied to a driven pile to bend the pile such bending will occur about the neutral axis of the pile structure.

7. An accepted definition of "neutral axis" of a structural section or pile section is "an axis which is passed through the structural section or any section would result in a balance of areas on one side of a neutral axis as against the area on the other side. In other words there would be a complete balance of weights along the line called the neutral axis." To give proper "section modulus" to a pile of the type disclosed in the patent in suit and allied designs, as much material as is possible is placed on the outer sides of the two pile sections, taking a cross sectional view, such disposal of metal being as far as possible away from the neutral axis of the two pile sections.

8. In the patent in suit no specific mention is made of "section modulus" or "neutral axis," but such terms are ordinarily used in a multitude of engineering computations and are useful and well known as means of measuring and compiling material values and structural safety loads.

CLAIMS IN ISSUE

9. All five claims of the patent in suit are declared upon; four are directed to a method of fabricating the structure, while the fifth is for an article of manufacture, i. e., a specific type of pile. They read as follows:

> 1. The method of constructing a metal pile having a full-wave cross-section, which method consists in separately forming complementary parts of said pile with oppositely curved half-wave cross-sections, and in rigidly uniting said parts along adjoining longitudinal edges thereof with the half-wave cross-sectioned parts extending in opposite directions from the rigid joint between the adjoining edges of said complementary parts.
>
> 2. The method of constructing a metal pile which method consists in separately rolling complementary parts of said pile with curved cross-sections, and in rigidly uniting one longitudinal edge of one of said parts

with one longitudinal edge of the other of said parts, the other longitudinal edges of said parts being presented outwardly in opposite directions with respect to the rigid longitudinal joint between said parts and with the curved cross-sections of said parts disposed on opposite sides of a common plane through said oppositely and outwardly presented other longitudinal edges.

3. The method of constructing a metal pile which method consists in separately rolling complementary parts of said pile with oppositely curved cross-sections, and with one edge of each of said complementary parts adapted to interlock with one edge of the other of said complementary parts, in interlocking said edges with said complementary parts extending oppositely with respect to said interlocking edges and with said curved cross-sections disposed on opposite sides of a common plane, and finally in rigidly uniting said interlocking edges.

4. The method of constructing a metal pile, which method consists in separately rolling full length part-sections of the desired pile with half-wave cross-sections, in arranging said part-sections edge to edge along one edge of each part-section and with the other edge of each part-section presented away from the other part-section, said half-wave cross-sections being disposed on opposite sides of a plane common to the opposite edges of both of said part-sections to form a full wave cross-section of compound curvature, and finally in rigidly uniting the adjoining edges of said part-sections to form a pile having full-wave cross-section.

5. As an article of manufacture, a metal pile comprising two complementary parts, said parts being rolled separately to provide them with trough-shaped cross-sections and rigidly united along adjoining longitudinal edges with said complementary parts presented in opposite directions from the rigid joint therebetween and having the trough-shaped cross-sections of said complementary parts respectively disposed on opposite sides of a common longitudinal plane through said metal pile.

10. The type and construction of the sheet piling used by the United States Government and charged to be an infringement of the patent in suit, is exemplified by the sheet piling installed at the Boston Army Supply Base.

This piling was trough-shaped, in two sections, which have at their outer extremities or edges a claw-shaped portion adapted to engage the edges of similar trough-shaped sec-

tions, which are oppositely disposed with respect to their concavity, that is, one section faces in one direction, the other in reverse. The adjacent claw ends of each pile section are in engagement, and connect the two sections. This connection or interlocking relation is not fixed in the sense of being immobile when the two sections are initially connected. Metal straps are placed on both sides of the engaged claw portion and are riveted through both pile sections. When the rivets are in place through the added metal straps the two pile sections are rigidly united and form a full wave pile unit. In the Boston construction the two pile sections connected as heretofore set forth, were driven as a unit. The next unit identical with its predecessor was then engaged at the claw edge of the already driven unit and driven home.

11. The physical example of sheet piling of the type used by the United States shows two portions of sheet piling in interlock at their contiguous edges, with a metal strap embracing this interlock and riveted through both sections of the piling. This example has the metal strap riveted on one side only of the engaged pile sections, whereas the drawings show the strap or angle iron riveted on both sides of the sections over the interlock. Furthermore, the exhibit drawings just referred to show additional plates of metal riveted to the outer faces of the two trough-shaped pile sections (see plaintiff's exhibit 7—Pile Type 1 to 3, a longitudinal view of the assembled pile unit) but the physical example, plaintiff's exhibit No. 6, does not show this plate as a feature of its construction.

12. The evidence is clear that the purpose and effect of adding the metal plates is to increase the rigidity of the piles thereby giving to the unit a higher section modulus. In the piles used by the United States the neutral axis of the unit is indicated by the dotted line extending vertically through the two assembled pile sections at their interlocks. The same area and thickness of metal is disposed on either side of the neutral axis and lies the same distance from the neutral axis. Applying the engineering formula applicable to such an arrangement in a full wave or unit pile section, the section modulus resultant is the sum of the section

moduli of each individual pile member. The full wave pile section has therefore twice the rigidity of one of its component pile members.

13. The following prior art patents were available to those skilled in the art prior to the filing of the application which eventuated in the patent in suit.

PRIOR ART PATENTS

United States patent #707,837, issued Aug. 26, 1902, to L. P. Friestedt (plaintiff's exhibit 12).

United States patent #1,012,124, issued Dec. 19, 1911, to C. C. Conkling (plaintiff's exhibit 13).

United States patent #1,001,963, issued to P. J. Latham, Aug. 29, 1911 (plaintiff's exhibit 11).

United States patent #751,469, issued Feb. 9, 1904, to W. L. Cowles and J. N. Hatch (defendant's exhibit E-1).

United States patent #840,952, issued Jan. 8, 1907, to G. E. Nye (defendant's exhibit E-2).

United States patent #1,085,493, issued Jan. 27, 1914, to P. Schiffler (defendant's exhibit E-3).

United States patent #1,498,778, issued Jan. 24, 1924, to C. S. Boardman (defendant's exhibit F-1).

United States patent #1,330,240, issued Feb. 10, 1920, to C. C. Conkling and C. S. Boardman (defendant's exhibit F-2.)

British patent #6,926 of 1912 (defendant's exhibit E-4), to Larssen et al.

14. The pile unit of this patent is herewith reproduced, Fig. 2.

This structure consists of two trough-shaped sections 1 and 2 having flaring sides or legs. The two sections are assembled facing oppositely, the concavity of one section opposed to the concavity of the complemental section.

The sections are joined together by a rivet 3 through their contiguous legs. The patentee states in his specification that in addition to the means shown, i. e., rivets for connecting the section that these pile sections may be "otherwise secured."

In addition to thus fabricating a pile unit of two trough-shaped or full-wave pile sections, the patentee provides on

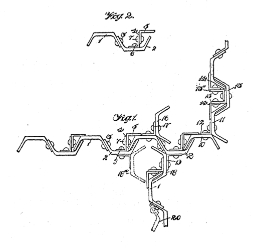
No. 751,469. PATENTED FEB. 9, 1904.

W. L. COWLES & J. N. HATCH.

METALLIC PILING.

APPLICATION FILED AUG. 18, 1903

NO MODEL.



section 2, a Z-bar composed of two L-shaped angle irons 4 and 5 riveted to the inner face of said section 2, by rivet 6. This Z-bar is so positioned that one leg indicated by the numeral 5 projects across the outer edge of section 2. This arangement forms a guide way between the outer edge of section 2 and the angle iron 5, into which the next pile unit, identical with the one shown in Fig. 2 is inserted and interlocked. The purpose of the interlock is to grip the pile unit next driven "so that after the sections are driven together in this manner the joint will be practically tight." The unit full-wave section shown in Fig. 2 may be utilized to form a straight longitudinal bulkhead or wall or by

suitable modifications shown in Fig. 1 accommodate to corner or right angle construction.

This patent discloses an **S**-shaped or full-wave pile unit composed of two separate piles rigidly connected before being driven. It also discloses an interlocking means as part of the unit located on its edge adapted to guide and engage the next succeeding unit.

The neutral axis of the pile unit is substantially on a line passing through the center of the unit parallel with the faces of two pile sections 1 and 2.

The pile unit of this patent, Fig. 2, has a section modulus of substantially double the value of the section modulus of one of the individual sections composing the unit.

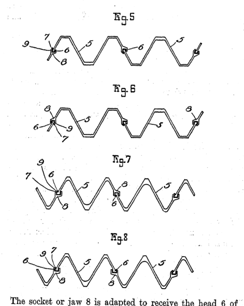
This patent was not cited by the Patent Office as anticipatory in the prosecution of the application of the patent in suit.

15. The patent to G. E. Nye, No. 840,952, is entitled "Interlocking Metal Sheet-Piling," and consists of two pile sections A, described by the patentee as channel bars, disposed in opposite directions, their abutting edges secured by **Z**-bars, and by angle irons. Bolts secure the **Z**-bars to the channel bars. After the **Z**-bars are bolted to the channel bar and the next succeeding pile or channel bar has been interlocked and driven, the two channel bars are fixedly and rigidly connected one to another by tightening up on the bolt which extends through both **Z**-bars and the last driven channel bar. The patent discloses a type of interlock for successive single pile sections or channel bars and does not suggest or provide for uniting two pile sections as a dual unit and driving simultaneously two sections.

16. The patent to P. Schiffler entitled "Interlocking Metal Sheet Piling," No. 1,085,493, concerns the provision of an interlocking pile section shown in Figs. 5–8 in the planks or pile sections.

The sections shown in the said figures comprise two full slanting uninterrupted walls 5 forming a **Z**-shaped body portion. At one of the extremities of this body portion are located heads 6, while at the other are provided a socket or jaw 8.

Reporter's Statement of the Case



The socket or jaw 8 is adapted to receive the head 6 of the next adjacent full-wave or Z-shaped pile section.

This patent presents a unitary full-wave pile section formed of one piece of metal.

The interlocking devices connect the next succeeding full-wave section, producing an interlocked bulkhead or wall, the individual sections of which are of high section modulus and the neutral axis of the wall is on a line central

to the pile and running through a point located at the interlocks 6 and 8. See Figs. 1 and 2. An equal area of the pile structures thus lies on opposite sides of the neutral axis and at equal distances from said neutral axis.

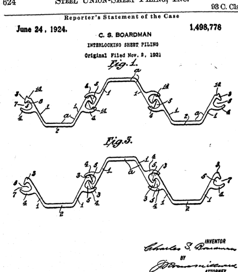
Each pile section has a trough-shaped portion 5, Figs. 4, 5, 6, with long angular legs and oppositely disposed trough sections with shorter legs of the same angularity, adapted to engage similar short legs on the next succeeding pile at points 6 and 9, the two interlocked legs, resulting in a trough section of the same dimensions as the long legged trough section.

17. The patent issued to Charles S. Boardman, No. 1,498,778, is on an improvement in "Interlocking Sheet Piling." The nature and objects are to provide a piling that cooperates with the backing or bracing supporting it and to make the interlocking devices watertight when driven.

The patentee states, lines 44 to 56, page 1 of the specification: "To this end I have designed my improved section to have a deeply channelled web portion, intermediate of the interlocking members of a form and arrangement providing for a large area of bearing contact with the supporting timbers and to form a section of substantial depth or over all dimensions taken laterally, and wherein the relative arrangement of the interlocks are such that the channelled web portions of the adjacent interlocked sections are alternately disposed upon the opposite sides of the neutral axis of the wall."

In Figs. 1 and 3 are shown pile sections, deeply channelled or trough-shaped, having a web portion 2 relatively thickened with respect to the walls of the trough 1. The troughs are provided with a hook or flange 3 and a guard 4 to enclose a pocket 5 which is adapted to receive the hook 3 of an adjacent pile. Each adjacent or subsequently driven pile member is oppositely arranged with respect to its predecessor. When connected or interlocked the pile sections present a wall or bulkhead in which the maximum metal of the web portions a is disposed on both sides of the neutral axis at a substantial distance.

The patent states page 2 of the specification, lines 54 to 64: "In accordance with my present invention the inter-



locking flanges are arranged whereby when the piling sections are interlocked the channeled web portions of the respective sections will be alternately disposed at opposite sides of the central longitudinal axis of the resulting wall thereby forming a wall of substantial width or depth in a lateral direction and with a substantial amount of metal at the maximum distance from the neutral axis."

18. The patent to Conkling & Boardman, No. 1,330,240, relates to sheet piling and particularly to the provision of a very strong interlock to withstand tensile or longitudinal strain.

The arrangement or position of the pile elements, however, cause their web portions 1 to lie in different longitudinal planes with respect to the neutral axis of the wall.

The specification, speaking of this feature of the structure reads: "Incidental to this peculiar arrangement it will

be noted that the web portions are alternately arranged to each side of the neutral axis of the wall, thereby locating the greater part of the metal at the maximum distance from the neutral axis of the wall so as to obtain the greatest tensile strength thereof and to produce a wall which is particularly strong in its insistence to lateral stresses."

19. British patent No. 6926 of 1912 granted to Larssen and the Firm Deutsch-Luxemburgische Bergwerks Und Hütten-Aktiengesellchaft, illustrates an interlocking pile arrangement in which deeply dished pile sections of **U**-shaped cross-section, facing alternately right and left, are interlocked at their edges.

In Fig. 1 the piles are shown interlocked in series forming a wall or straight piling structure. Figs. 2, 2a illustrate the same type of deep trough-shaped pile sections with **S**-shaped flanges b and hooks f located at both edges or extremities.

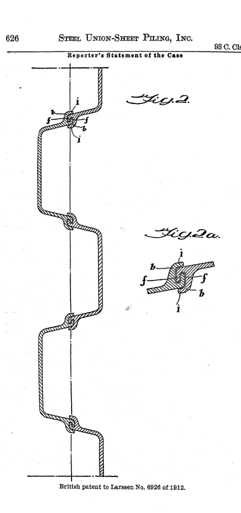
The two hooks f engage each other when the piles are united and the outer part i of the **S** flanges embrace and overlap the hooks f.

The pile sections shown in this patent are deep arch pile sections and are well known and have been used in this country for more than ten years. The deep arch contributes a high section modulus to the pile section which is very resistant to bending strains and lateral pressure. The oppositely disposed pile sections lie on either side of the neutral axis of the wall, and at equal distances therefrom.

The individual pile members are rolled in the steel mill and the deep trough design presents no difficulties to successful rolling.

20. Returning to the patent in suit, the patentee in his specification, line 1, page 2, unequivocally declares "The important feature consists in forming a pile with a cross-section of two similar elements a which are joined together before ramming." This procedure is well exemplified in the disclosure of the Cowles and Hatch patent No. 751,469.

The Cowles and Hatch patent, supra, accomplishes this result with the same sequential operations, utilizing the same mechanical elements.



British patent to Larssen No. 6926 of 1912.

The deep arch or trough-shaped pile sections shown in the Larssen patent, defendant's exhibit E-4, and in the patent to Boardman, defendant's exhibit F-1, together with patent No. 1,085,493 to Schiffler (defendant's exhibit E-3) all portray pile sections of high section modulus and are the equivalent of the individual sections comprising the dual unit of the patent in suit.

It would not require more than mechanical skill to rigidly connect the prior art piles to increase the section modulus of a driving unit comprised of two pile sections.

The claims and patent in suit are invalid for lack of invention in view of the prior art.

The court decided, on the report of the commissioner, that the patent of plaintiff is invalid and that plaintiff was not entitled to recover.

Opinion per curiam: This suit is brought for the alleged infringement of a patent, the application for which was filed by Arthur Mauterer in 1925 and resulted in the patent in suit, No. 1,689,678, issued October 30, 1928. The findings show that this patent, together with all rights of action for past infringements was assigned to the plaintiff in this suit on October 17, 1935.

The findings fully set out the subject matter of the patent and the nature of the patented structure, together with the claims of the patent upon which the suit is brought. It is not necessary, however, to go into detail in reference to these matters as the suit appears to have been abandoned. No argument has been made on behalf of the plaintiff, and the findings of the commissioner of this court, which we have adopted, show plainly that in view of the prior art the patent is invalid for lack of invention.

Plaintiff's petition must be dismissed and it is so ordered.

GEORGE B. MARX, INCORPORATED, ASSIGNEE OF GEORGE B. MARX, v. THE UNITED STATES

[No. 43437. Decided May 5, 1941]

On the Proofs

Government contract; order for wire reel carts for Signal Corps, U. S. A.—Under the special jurisdictional act of June 25, 1936, it is *held* that the plaintiff is entitled to recover on the contract for the manufacture of wire reel carts for the Signal Corps, U. S. A., dated August 6, 1918.

The Reporter's statement of the case:

Mr. Paul Shipman Andrews for the plaintiff.

Mr. William A. Stern, II, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The court made special findings of fact as follows:

1. Plaintiff was incorporated in 1924 under the laws of the State of New York, and is the assignee from George B. Marx of the claim here sued upon.

2. Suit herein is brought under act of Congress approved June 25, 1936, reading as follows, and the claimant named in the act is the plaintiff herein:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Court of Claims of the United States be, and it is hereby, given jurisdiction to hear and determine the claims, legal or equitable, of George B. Marx, Incorporated, a New York corporation and assignee or successor of George B. Marx, growing out of or arising under or from the suspension and cancellation of a certain contract numbered 4241, dated August 6, 1918 (order numbered 110016), which claims are for reimbursement and payment for services performed and goods furnished under said contract and order, for goods manufactured or in process of manufacture, and for materials and equipment bought, contracted, or committed for, by George B. Marx under the said contract, which contract was made by the United States with the said George B. Marx for the construction of a quantity of carts for carrying wire for the use of the Signal Corps, United

States Army; and to enter decree or judgment upon said claims, notwithstanding the bars or defenses of any settlement, release, or adjustment heretofore made or of any assignment of said claims by George B. Marx to George B. Marx, Incorporated, or of laches, lapse of time, or of any statute of limitations: *Provided, however*, That the United States shall be given credit for any sum heretofore paid the said George B. Marx on said claims.

SEC. 2. The record or any part of the record of the proceedings and hearings had before the Committee on War Claims of the House of Representatives, on H. R. 1611 in the second session of the Seventy-first Congress, and the third session of the Seventy-first Congress, together with any and all exhibits, affidavits, or inventories presented to or filed with the said War Claims Committee of the House of Representatives in connection with said Act, and together with any and all Government reports, statements, inventories, and other documents, on file in the War Department or any other department of the Government or elsewhere, having a bearing upon the claim embodied in said Act, may be introduced before the Court of Claims with the full force of depositions subject to objections as to materiality and relevancy.

SEC. 3. Such claims may be instituted at any time within four months from the approval of this Act. Proceedings in any suit brought in the Court of Claims under this Act, appeals therefrom, and payment of any judgment therein shall be had as in the case of claims over which such court has jurisdiction under section 145 of the Judicial Code, as amended (49 Stat. 2362).

The petition was filed October 7, 1936.

3. While engaged in the manufacture of wire reel carts for the Signal Corps of the United States Army, George B. Marx, on or about June 6, 1918, received from Major I. D. Hough, Procurement Officer of the Signal Corps, an oral order for 200 more. On the 21st of June, 1918, Major Hough gave to Marx the serial number 91362 by which to identify the order. July 8, 1918, an order in writing was given him for the carts, with serial number 91362, without designating the price, stating that Contract No. 4241 would follow. The written order is filed in evidence as part of plaintiff's Exhibit No. 7 and is made part hereof by reference. The designation of the order was changed July 26, 1918, to No. 110016.

The order was amended by the Signal Corps August 3, 1918, setting a price of $218,000, and reading:

1. Kindly refer to Signal Corps Order No. 110016, placed with you July 8, 1918, for wire carts.
2. It is our understanding that you have agreed to accept a price of $1,090.00 per cart on Order No. 110016, and in view of this fact, said order is hereby amended to read as follows:

ITEM 1

"200 Wire Carts, Type 'N', similar to those to be furnished on Orders #91136 and #91144, as per specifications and drawings to be furnished later, to be serially numbered from 240 to 439, inclusive, at $1,090.00 per cart________________________________ $218, 000"

The amendment is filed in evidence as plaintiff's Exhibit No. 8 and is made part hereof by reference.

The order as amended was by reference incorporated in a formal contract between George B. Marx and the contracting officer for the Signal Corps August 6, 1918, designated Contract No. 4241. The contract provided for its rescission by the United States only in the event of the contractor's failure to perform.

Copy of the formal contract is filed in evidence as plaintiff's Exhibit No. 9 and is made part hereof by reference.

The work on which the contractor, George B. Marx, was engaged at the time the oral order of June 6, 1918, was given him, consisted of 100 carts on Order No. 91136 and 100 on No. 91144, being the orders referred to in the amendment of August 3, 1918. Specifications and drawing to be furnished later were not at the time in existence due to the fact that the design of the cart was that of Robert D. Marx, a son of George B. Marx, and the carts were being made on Robert's model and design, without specifications originated by the Government.

On receipt of the oral order the contractor continued his program of production, without waiting for the conclusion of formalities, for the reason, and it was so understood by both parties, that the Army was in great need of the carts, which were to be used in maintaining communications between front and rear in the armed forces abroad.

4. The contractor was nearing the end of his performance of Contract No. 4241 when on December 9, 1918, he received the following telegram from the contracting officer:

> Stop production immediately on order one one naught naught one six covering two hundred wire carts make no more commitments and incur no further expense in connection therewith acknowledge receipt.

The contractor objected to this order and on December 10, 1918, the contracting officer wired him as follows:

> Re tel tenth concerning order one one naught naught one six you are instructed to follow instructions previously sent and stop all production further expense and commitments after receipt of our telegram will be at your own risk.

December 12, 1918, the contracting officer transmitted to the contractor the following communication:

> 1. This letter confirms our telegram to you of December 10, 1918, reading as follows:
> "Re tel tenth concerning order one one naught naught one six you are instructed to follow instructions previously sent and stop all production further expense and commitments after receipt of our telegram will be at your own risk."
> 2. Owing to certain technical Government laws and regulations it would work hardship on a contractor if this office were to cancel this contract outright. You will, however, understand that the request that you stop production is intended virtually to effect a cancellation except as to the quantities specified for production.
> 3. In this connection you are advised that you should engage no new labor or replace labor without the prior approval of this office. All Sunday, night, and overtime labor should be discontinued. No new contracts should be made with suppliers or subcontractors without first obtaining the prior approval of this office.
> 4. The Finance Division of this Bureau will make an investigation as to the expenses incurred by you which are chargeable to this contract and will furthermore endeavor to arrive at a tentative basis of settlement with your Company subject to final approval by the Bureau of Aircraft Production in Washington.
> By direction of the Director of Aircraft Production.

The contractor stopped production on Contract No. 4241, Order No. 110016, December 14, 1918.

5. Pursuant to the procedure outlined in paragraph 4 of the contracting officer's letter of December 12, 1918 (finding 4), the Government caused inventories to be made of all material, in whatever stage of manufacture, in the contractor's factory, which he had on hand for incorporation in the wire reel carts covered by Contract No. 4241.

February 8, 1919, the Signal Corps transmitted the following letter to the contractor:

> 1. This office has been directed to check inventory of parts and finished material furnished on the above order, which is now in process of termination.
>
> 2. In order to properly accomplish this check the material should be made available to Inspector Sweeney with such assistance as may be necessary to him.
>
> 3. This means that the place of storage should be heated in some manner and sufficient labor to move the heavy wheels and chests which are now piled on miscellaneous parts at present stored in cases.
>
> 4. Inspector Sweeney has been directed to check the material with all possible haste that can be readily reached or handled by the force reporting to the Inspector.
>
> 5. Acknowledgment of receipt of this letter is requested with advice as to when the contractor will be ready for the inspection force.

The contractor furnished the requested facilities and assistance, and Inspector Sweeney began an inventory February 12, 1919, and completed it March 17, 1919.

At the same time Captain Potts of the Signal Corps was detailed to the contractor's plant to investigate the situation, and in collaboration with the contractor arrive at the amount due the contractor on Contract No. 4241. The amount they arrived at was based on retention by the contractor of all material and partly finished products, no allowance to the Government being made therefor. There were no finished products. The particulars of this amount are briefly as follows, and were arrived at on or about March 18, 1919:

Item		
1. Raw materials:		
a. Cost	$25, 254. 04	
b. Inward handling charges	505. 08	
c. Overhead	1, 010. 16	
		$26, 769. 28

Item		
2. Partly finished products:		
a. Cost of raw material	$110, 017. 07	
b. Cost of labor	20, 034. 52	
c. Overhead	19, 099. 21	
		$149, 150. 80
3. Profit:		
10% of Item 2		14, 915. 08
4. Special facilities:		
a. Cost	30, 556. 62	
b. Less value at cancellation	19, 638. 32	
		10, 918. 30
5. Percentage of uncompleted portion of contract applied to Item 4 (5%)		545. 92
6. Commitments	8, 117. 58	
Less value of residual material	3, 075. 46	
		5, 042. 12
7. Additional development and experimental charges		857. 04
		208, 198. 54

The contractor made claim for the sum of $208,198.54 and by letter to the Bureau of Aircraft Production, War Department, March 27, 1919, requested prompt payment thereof.

No attempt appears to have been made by the Government to settle with the contractor on the foregoing basis.

6. In May 1919 while the contract material was still at the contractor's plant, the Bureau of Aircraft Production sent an accountant by the name of Franklin C. Leyhe to the contractor's plant to investigate and report on the cost for the purpose of effecting a settlement with the contractor.

In this audit the accountant and the contractor's representative agreed upon the time consumed by the contractor's mechanics and laborers on each unit of material. There were available to the accountant the pay rolls and books of account and the Sweeney inventory.

Soon after Leyhe had completed his audit the supposed result thereof was communicated to the contractor by defendant's officers in the following summary:

Item		
1. Raw material on hand:		
a. Cost of material	$91, 941. 24	
b. Inward handling charges	897. 00	
		$92, 838. 24

Item		
2. Partly finished products on hand:		
a. Cost of material	$24,462.53	
b. Cost of labor (Schedule 1a)	7,672.81	
c. Overhead	4,465.58	
	36,600.92	
Add 10% profit	3,660.09	
		$40,261.01
3. Finished products on hand:		
None.		
4. Special facilities purchased:		
a. Camouflage designs	150.00	
b. Metal and wood patterns	470.11	
c. Special tools	126.60	
d. Fixtures	7.18	
		753.89
5. Commitments:		
a. George Staats & Co	364.49	
b. Brooklyn Brass Works	12.30	
c. Ball & Roller Bearing Co	2,112.13	
		2,488.92
6. Other items:		
a. Interest on raw material	2,242.51	
b. Insurance after suspension	1,262.98	
c. Experimental costs	38.25	
		3,543.74
		139,885.80

How the various amounts in this tabulation were arrived at was not at that time disclosed to the contractor. The tabulation bore the following certificate, purporting to be signed by the accountant:

> I hereby certify that I have examined the claimant's records pertaining to the foregoing statement of claim and believe them to be correctly stated, and to constitute a just and proper claim versus the United States of America, in the amount of One Hundred Thirty-Nine Thousand, Eight Hundred Eighty-Five Dollars and Eighty Cents ($139,885.80).

This certificate was not in fact signed by the aforesaid Franklin C. Leyhe, but was signed in another's handwriting in letters as follows: "Franklin C. Leythe." It was followed by the several certificates of seven various officers of the Bureau of Aircraft Production, approving payment in

the sum supposedly certified by the accountant, or certifying to other matters.

The sum found due, viz, $139,885.80, was grossly in error. The record does not show that this amount was determined by any responsible Government officer. The record indicates bad faith on the part of the accountant or upon the officer who gave him his instructions and that a good faith effort was not made to arrive at the amount of damages. The officers who signed the several certificates merely approved payment of the sum supposedly certified by the accountant.

The contractor adopted this statement as his claim on or about May 28, 1919, because his creditors were pressing him for settlement, he needed the money to satisfy them, and could not, without impairment of his credit, wait for further calculation of the amount due.

The claim was paid on or about June 25, 1919, in the sum of $139,876.86, an underpayment of $8.94.

Photostatic copy of the statement of claim is filed in evidence as defendant's Exhibit No. 1, and is made part hereof by reference.

7. July 2, 1919, and thereafter the contractor requested the Bureau of Aircraft Production to remove the contract material from his plant, and the material not being removed, demanded storage charges, which the defendant has not paid.

The contractor was without knowledge as to the inventory on the basis of which his claim had been paid in the sum of $139,876.86, nor had he knowledge as to the details thereof beyond the foregoing summary, and these details he requested.

In the latter part of August 1919, the Bureau of Aircraft Production proceeded to take possession of the contract material located at the contractor's plant, making an inventory of the property as it was removed and receipting therefor to the contractor. The inventory and receipts were one and the same documents and were on forms entitled "Outgoing Tally Sheet." The property likewise was inventoried as it came into the Government warehouse from the contractor's plant, on forms designated "Tally Sheet (In)." Removal of the contract material from the contractor's plant was completed by the Bureau of Aircraft Production September 11, 1919.

As the property was used or disposed of by the Government and removed from Government storage, it was again inventoried and the various items entered on forms entitled "Tally Sheets (Out)." This last inventory was concluded June 29, 1920.

8. Details of the Leyhe audit, showing how the various items comprising the sum of $139,885.80, heretofore referred to, were derived, were, after repeated requests by the contractor, furnished the contractor February 21, 1921, for the first time. They revealed to him an extraordinary number of gross errors, to the advantage of the Government and disadvantage of the contractor.

9. In the year 1928 the War Department ordered a reaudit of the plaintiff's claim against the United States arising by reason of cancellation of Contract No. 4241, and to the end that the correct amount thereof might be determined caused Thomas W. Penn, one of its accountants, to re-examine the entire claim. This Penn did, in collaboration with the contractor's representative, beginning in December of 1928, at which time there was available to him the books and records of the contractor, and the work previously done on the claim by the Government, including inventories, classifications, and miscellaneous data.

Penn found by his audit that in addition to the sum of $139,876.86 there was due the contractor $58,259.02, and he summarized the amount due the contractor in settlement of the cancellation as follows:

Item		
1. Raw material:		
a. Cost	$34, 697. 57	
b. Castings	928. 65	
c. Inward handling charge	356. 26	
		$35, 982. 48
2. Partly finished products:		
a. Cost of material	$101, 162. 54	
b. Cost of direct labor	18, 428. 40	
c. Overhead	14, 558. 44	
d. Redesigning and experimental work	13, 491. 80	
e. Profit	13, 491. 80	
f. Indirect overhead	6, 837. 96	
		$155, 247. 74

Item	
3. Special facilities	$2,491.63
4. Commitments	2,488.92
5. Insurance after suspension	1,262.98
6. Freight on raw materials	662.13
	198,135.88

Correction of a mathematical error in the Penn audit of $718.74 reduces the total of $198,135.88 to $197,417.14, which is $57,540.28 in excess of the amount paid. The Penn audit, except for the error of $718.74 and an apparent duplication of one insurance item, is substantially correct in its main features.

10. Part of the work of fabricating parts of the wire reel carts to be made and delivered under Contract No. 4241 was sublet by the contractor to The Hunter Illuminated Car Sign Company. The Hunter Company's work consisted of making chests for the carts out of 18-gauge steel, applying to the corners thereof castings that had been machined by George B. Marx and fitting the chests with locks that had been furnished by George B. Marx. After the Hunter Company had delivered the chests to him, George B. Marx did considerable additional work on them for which he furnished other material. For the work done by the Hunter Company, George B. Marx paid it the agreed sum of $17,100.00 July 2, 1919. In the Penn audit no profit was allowed on the contract sum of $17,100.00, so paid.

11. The contractor, George B. Marx, was owner of the real property on which he performed the contract work. During the period of performance the portion of the taxes, paid by him on such property, applicable to such work, was approximately $756.00. There was no allowance for this item in the Penn audit.

12. The wages of the men assigned by the contractor to assist Inspector Sweeney in compiling the inventory completed March 17, 1919, referred to in finding 5, paid by the contractor, amounted to $2,864.91. The overhead thereon was $2,263.28, a total expense of $5,128.19. There was no allowance for this item in the Penn audit.

13. The fair and reasonable storage charges for the contract material in the contractor's plant from the time that

the material was available for Government inventory to the time it was removed from the factory were not less than $1,736.08.

14. Inspector Sweeney, heretofore referred to in finding 5, was inspector at the contractor's plant during the period of performance. Under him were four junior inspectors. Lieutenant O. C. Terry of the Signal Corps had charge of production of Contract No. 4241 in the contractor's plant for the Government.

During the progress of manufacture, in inspecting and passing upon the material to be incorporated in the final product, Inspector Sweeney had it separated into different piles.

Under Inspector Sweeney's direction the junior inspectors accepted such material as undoubtedly complied with the contract requirements, and set aside in separate piles for Inspector Sweeney's final judgment material that was doubtful. In due course Inspector Sweeney examined the doubtful material and made his own rejections.

While one of these doubtful piles, consisting of brass and steel castings, was awaiting Sweeney's inspection Lieutenant O. C. Terry arbitrarily ordered and caused the contractor, during Sweeney's absence, and over the contractor's objection and protest, to remove the pile from the factory, as a result of which the material did not receive final inspection.

The net expenditure of the contractor for this material was approximately $10,000.00. The percentage of probable rejections upon final inspection was 8%, leaving a probable acceptance of $9,200.00 net worth of material rejected without cause.

15. The price stipulated in Contract No. 4241 was based on the use of certain steel castings. The contractor was being strongly urged by the Signal Corps to expedite the production of the wire reel carts. Upon the representation to the contractor of this urgency the contractor suggested that production might be advanced by the use of bronze castings in the place of these certain steel castings. The bronze castings did not require the lengthy process of annealing required by the steel castings. This substitution the Signal

Corps requested the contractor to make. In view of the fact that the steel castings had already been ordered the steel castings would be surplus. It was agreed that they would be considered and taken by the Government as spare parts. This understanding was not reduced to writing. The bronze castings were more costly than the steel castings, but there was no increase in contract price. The substitution would in fact have advanced the delivery of the wire carts.

These certain steel castings were not taken by the Government and the contractor had to dispose of them as junk. Their cost to him was $3,273.54. On their sale he received $48.00, a loss of $3,225.54.

The court decided that the plaintiff was entitled to recover.

JONES, *Judge*, delivered the opinion of the court.

Plaintiff, as assignee of George B. Marx, instituted this suit to recover damages alleged to have been caused by the cancellation of a wartime contract to furnish wire reel carts to the Signal Corps of the United States Army.

The case is unusual in many respects.

In the jurisdictional act it is provided that any part of the record of the committee hearings or the proceedings in Congress and all exhibits, affidavits or inventories filed with the War Claims Committee and all government reports, statements and other documents on file in any department of government "or elsewhere" having a bearing on the claim, "may be introduced before the Court of Claims with the full force of depositions subject to objections as to materiality and relevancy."

Before the World War George B. Marx had been engaged at the request of the Signal Corps of the Army in developing wire carts. These carts carried reels of wire which unwound as the carts were drawn along the ground. The wire was used in setting up communication between different army units, especially in combat areas. The carts were so designed that they would unreel the wire over rough surface areas and reel it up again when it was desired to be used elsewhere under the rapidly changing conditions and the shifting of positions.

George B. Marx appeared to have the ability to make the types of vehicles which the Signal Corps needed and his son, Robert D. Marx, a special talent in designing them.

At the time the order in question was given, Marx was already engaged in fulfilling one contract for such carts for the defendant. On June 6, 1918, he received from Major Hough, procurement officer, an oral order for 200 more. On June 18 he was given a serial number to identify the order, and on July 8, 1918, the order for the carts was reduced to writing with the statement that the contract was to be numbered 4241, and would follow. The price was not yet stated. On August 3, 1918, the order was amended setting a price of $1,090 per cart. The formal contract was signed August 6, 1918.

Specifications and designs were not included in the contract as the design was to be that of the son, Robert D. Marx.

Because of the urgent need, plaintiff proceeded with his plans for production as soon as the oral order was given without awaiting the formal signing of the contract. This was understood by both parties.

The contractor was far along toward the completion of his contract when on December 9, 1918, he received a wire from the contracting officer directing him to stop production.

The issue is as to the amount of damages caused by the cancellation of the order.

Under the broad provisions of the act conferring jurisdiction on the Court of Claims, a wealth of documents, papers, affidavits, and inventories has been introduced.

By direction of the Signal Corps, Inspector Sweeney was detailed to check inventory of parts and finished material and arrange proper storage.

At the same time Captain Potts was sent to the contractor's plant to investigate and to endeavor to arrive at an agreement with the contractor as to the amount due by the Government. His findings are based on the retention by the contractor of all material and partly finished products.

The amount found to be due by the Government was the sum of $208,198.54.

The work of Captain Potts was finished about March 18, 1919.

An inspection was made of the original records including time cards, pay-roll books, vouchers, and original invoices of materials.

In May 1919 C. E. Varcoe, of the Bureau of Aircraft Production of the United States Army was sent to the Marx plant to make an audit for his bureau. Before he had completed his inventory he was directed to discontinue because the task of settling the contract had been turned over to the Signal Corps.

In June 1919 the Bureau of Aircraft Production sent an accountant by the name of Franklin C. Leyhe to the contractor's plant to make an investigation and report for the purpose of endeavoring to effect a settlement. After Leyhe returned, the defendant's auditor communicated with the contractor advising that the amount due had been found to be $139,885.80. It developed later that the certificate to the tabulation was not signed by Franklin C. Leyhe, but was signed in another's handwriting as Franklin C. Leythe.

On account of the fact that his creditors were pressing him for settlement and he could not postpone payment without imperiling his credit, the plaintiff accepted this sum, at the same time protesting its insufficiency.

Many errors were found in the Leyhe report. In fact, Leyhe himself made an affidavit some time later to the effect that a portion of the summary statement of claim purporting to have been certified to and signed by him was prepared without his knowledge, and that such statement was not signed by him.

A careful examination of the record fails to show that there was any real effort on the part of the accountant to arrive at the true amount of the damages. On the contrary, there is considerable evidence to indicate a lack of good faith either on the part of the accountant or on the part of the officer who gave him his assignment and instructions.

To say the least, the numerous mistakes in his report, the circumstances under which it was made, the facts that later developed in reference to him and to his report, and the numerous documents, affidavits, and instruments filed of record in this case tend to discredit his report and make it of little value in attempting to arrive at a proper conclusion.

Frank S. Cooley of the Signal Corps made a separate inventory of the materials at the plant.

At the time the material from the plant was moved into the Government warehouse a check was made of the material in what was termed "Tally In" sheets of the Signal Corps. This gave the number of pieces and classified the materials as rough, partly finished, or finished.

In the year 1928 the War Department directed a reaudit of the plaintiff's claim against the United States and detailed Thomas W. Penn, one of its accountants, to re-examine the entire claim. He began work in December 1928. There was made available to him the books and records of the contractor and the work previously done on the claim by the Government, including inventories, classifications, and miscellaneous statements.

According to the Penn audit, in addition to the sum of $139,885.80, there was found to be due the contractor $58,259.02. The items making up this amount are set out in the special findings.

The Penn audit, while not entirely accurate, appears to be more nearly so than any of the others that were made.

We have gone through the various items that are included in these reports and have checked them against the numerous documents, affidavits, and instruments set out in the voluminous record. Among these items were insurance, interest, overhead, depreciation, labor costs, the classification of materials, taxes, cost of inventory, and miscellaneous others.

One item, that of insurance, was found to be included twice, and the second inclusion was therefore eliminated. The interest payment on money invested in materials purchased for the contract has been disallowed, because much of the material on hand was found to have been paid for after the plaintiff had been paid the $139,885.80. Other items not properly included or not clearly proved or not proved in full have been reduced or discarded entirely in accordance with the best available proof as shown by the record.

After making these various corrections we find that there is a balance due the plaintiff in the amount of $52,235.12.

Inasmuch as the special act conferred jurisdiction upon the Court of Claims to enter a decree or judgment notwith-

standing the bars or defenses of any settlement, release, or adjustment heretofore made, we find that the plaintiff is entitled to recover the amount indicated.

The settlement of this claim has been long delayed. That delay has not been the fault of the plaintiff. At no point in the extensive record is there any indication that the work done by the plaintiff was not entirely satisfactory. In fact, the record abundantly proves that the plaintiff was doing a much needed work and was furnishing vital materials for the prosecution of the war, and that the articles which he produced were in every way satisfactory. He has at various times shown a disposition to cooperate with the various officials of the different departments of the Government who were sent to check up on his claim for damages and upon the materials which went into the items of expenditure, notwithstanding these numerous checks and investigations must have become somewhat burdensome.

George B. Marx went forward with the work under the pressure of a great need, even before he had the formality of a written contract. He did so at the instance and urgent request of defendant's duly constituted officers.

The record clearly shows that he is entitled to recover from the defendant the sum of $52,235.12.

It is so ordered.

MADDEN, *Judge*; LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

INSURANSHARES AND GENERAL MANAGEMENT COMPANY v. THE UNITED STATES

[No. 43543. Decided May 5, 1941]

On the Proofs

Income tax; certificates issued under investment trust; valuation of shares returned as income by management company.—Plaintiff in 1927 and 1928 entered into certain agreements with a distributor and a trustee under which said agreements certain investment trust funds were set up, and certificates known as A shares and B shares were issued against such said trusts, with certain definitions as to the respective rights of holders

of said shares; and the compensation of plaintiff for its management services was in the form of separate B shares.

1. Where on March 12, 1931, plaintiff filed a claim for refund for taxes paid for the calendar year 1928, claiming refund provided that it was determined that the underlying trust funds from which plaintiff's reported income was derived were associations subject to the corporation income tax, and where the conditional provision of said claim was fulfilled; it is *held* that said claim was sufficient.

2. Where plaintiff on March 12, 1931, filed its first claim for refund of taxes paid in 1928 on 1927 income, which was within the permissible two-year period after payment of the tax, and where plaintiff on July 20, 1934, filed its claim for refund of taxes paid on 1927 income included in its return for 1928; it is *held* that the second claim was not a permissible amendment of the first, since the timely claim was specific both as to the item of income to which it related and as to the asserted ground for refund whereas the 1934 claim related both to a different item of income and a different ground for refund, and was not an amendment but a new claim filed late.

Where an original claim for refund is such that the facts upon which a proposed amendment is based would necessarily be ascertained by the Commissioner in investigating the merits of the original claim, the amendment may be made after the statute of limitations has run. *Pink* v. *United States*, 105 Fed. (2d) 183.

3. Where it is found that the B shares to which plaintiff became entitled in 1928 had at that time a fair market value of more than the total income returned by plaintiff for 1928; it is *held* that plaintiff accordingly underpaid, rather than overpaid, its 1928 tax and is accordingly not entitled to recover.

The Reporter's statement of the case:

Mr. William Flannery for the plaintiff. *Mr. Charles L. Brayton* was on the briefs. *Messrs William H. Hayes, Roger S. Brassel* and *William Flannery* were of counsel.

Messrs. Francis T. Donahoe and *J. A. Rees*, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. Insuranshares and General Management Company, plaintiff, is, and at all the times mentioned herein was, a corporation duly organized and existing under the laws of

the State of Delaware. Its proper corporate name until May 8, 1930, was "Insuranshares Management Company"; and since May 8, 1930, it has been "Insuranshares and General Management Company." The chief office of plaintiff until January 1, 1928, was at 49 Wall Street, New York, New York, and since January 1, 1928, it has been at 1 Exchange Place, Jersey City, New Jersey. It is no longer engaged in active business, and is now in process of dissolution.

Insuranshares Corporation is, and at all times mentioned herein was, a corporation, duly organized and existing under the laws of the State of New York. The date of its incorporation was March 21, 1927. It is referred to herein as the "Distributor."

Farmers Loan and Trust Company is, and at all times mentioned herein was, a trust company, duly organized and existing under the laws of the State of New York. Its present corporate name is "City Bank-Farmers Trust Company." It is referred to herein as the "Trustee."

2. During the years 1927 and 1928, plaintiff, the distributor, and the trustee entered into certain agreements, whereby there were created and established five separate investment funds designated A–27, C–27, F–27, H–27, and B–28. Funds H–27 and B–28 only are involved herein.

The several agreements were similar in that each provided for an arrangement whereby plaintiff would furnish investment advice and act as the designated "Manager"; the distributor would furnish funds to acquire by purchase, on the open market, selected common stocks of banks, trust and insurance companies, designated by plaintiff from a list specified in the agreements, for delivery to the trustee, and receive from said trustee, in return, certain participating shares designated "Insuranshares Trust Certificates," which it might retain or sell to others, including the general public; and the trustee was the custodian of the common stocks acquired and deposited by the distributor as above stated to constitute the underlying securities behind the participating certificates.

Agreement H–27 specifically provided that the distributor, upon recommendation of plaintiff, had purchased out of its own funds listed common stocks of at least 20 of 37 named

banks, trust and insurance companies, and had transferred and delivered the same to the trustee at a total cost (including carrying charges to date and cash to adjust any difference) of $400,000. Agreement B-28 also provided that, upon recommendation of plaintiff, the distributor had purchased out of its own funds and transferred and delivered to the trustee common stocks of at least 25 of 41 named banks, trust and insurance companies, at a total cost (including carrying charges to date and cash to adjust any difference) of $1,000,000. Both agreements further provided that the distributor would transfer and deliver to the trustee all subscription rights or warrants upon stocks already deposited, all stock dividends accrued or received, and all cash dividends received between the date of purchase and the date of delivery of the original securities to the trustee.

3. Each of the agreements relating to Funds H-27 and B-28 provided, among other things, for the issuance by the trustee of two separate kinds of participating shares. One of these, designated "Insuranshares Trust Certificates," was an inseparable combination, consisting of one or more shares known as "Class A" and the same number of shares known as "Class B." Each A share had a designated par value of $20, and each B share had no par value. Such a combination certificate entitled the owner thereof to an undivided distributive share and *pro rata* interest in and to the stocks and funds constituting the underlying trust fund on deposit with the trustee, as set out above. Each A share was entitled to a noncumulative semiannual distribution, out of the net income of the trust fund, at the rate of three percent per annum. Each B share, after distribution had been made on the A shares, was entitled to a *pro rata* distribution of at least 20 percent of the balance of the net income of the trust fund plus such further distributions therefrom as might be determined by plaintiff and approved by the distributor.

The owner of any inseparable combination A and B share had the power on two specified dates each year upon serving written demand on seventy days' notice in accordance with the agreements to cause such share to be redeemed at $20.00 and accrued dividend for the A part plus the *pro rata* value of the B part in the overplus of the fair market values of the

cash and securities in the Fund after the allowance for the A part and subject to the payment of a redemption fee of $2.00 and one-third of one percent of his distributive share. Upon liquidation of each Fund each A share was entitled to $20.00 plus accrued income and each B share both separate and inseparable to its *pro rata* interest in the fair market values of the assets in the Fund after deducting said $20.00 for each A share less certain fees.

Each agreement contained provisions for adjusting the price of shares to be sold when additional securities would be placed in the fund and additional certificates issued, so as to prevent dilution of the investments of earlier investors and to avoid giving to later investors a share in any increment already accrued to the fund.

Each of the agreements relating to Funds H–27 and B–28 also provided for the issuance of 18 separate B shares for each 100 of the combination A and B shares known as Insuranshares Trust Certificates. In Fund H–27, 20,000 combination A and B shares were originally authorized for issuance by the trustee to the distributor, and 3,600 separate B shares were similarly authorized for issuance by the trustee to plaintiff. In Fund B–28 the trustee was similarly authorized to issue 50,000 combination A and B shares to the distributor, and 9,000 separate B shares to plaintiff.

4. Plaintiff acted as the manager of the several funds during the years 1927 and 1928, and received as its compensation for such management, certificates for shares of separate B stock in amounts and on dates hereinafter set forth. Plaintiff's duties in managing Funds H–27 and B–28 were in particular, to recommend to the distributor what selected stocks should be purchased for delivery to the trustee in the first instance, and what additional block of securities should be added to the original deposit; to determine and direct the trustee, in its absolute discretion, without limit or liability on its own part, to sell and deliver specific stocks or securities on deposit in the funds in exchange for cash or other specified securities; to manage the trust funds in accordance with the terms of the written agreements, and to direct the investment and reinvestment of the funds in accordance with its best judgment; to exercise, directly or indirectly, any

rights incident to ownership of the securities on deposit in the funds including the right (1) to waive any right or release any property held as collateral thereto, (2) to vote upon any deposited stocks without restriction, (3) to direct the sale or disposition of any rights or warrants of purchase that accrued or issued from time to time with respect to any securities in the funds, (4) to cause any securities in the funds to be withdrawn and deposited under any agreement, whether or not accompanied by a plan of reorganization or other plan, and (5), in general, to take any action which, in its discretion, it deemed necessary or advisable to maintain or preserve the value of any security on deposit in such funds; to borrow money for the sole purpose of exercising subscription rights or warrants on stocks already held in the funds, and to mortgage or pledge, as security therefor, stocks and securities already on deposit in the funds, and to execute such notes, assignments, and other instruments necessary or proper to effect any such loan, mortgage, or pledge; to cause the books of account for the funds to be audited periodically, at such time as it might in its discretion determine, but at least once in each calendar year; to prepare and mail, on or before March 1st in each year, to registered holders of participating certificates a statement and annual report showing securities on deposit in the funds and the amounts thereof, the actual value of A and B shares, gross and net income (or loss) during the preceding calendar year, gross expenses, amounts charged to reserves against contingent liabilities, and amounts actually distributed on A and B shares; to determine the actual value of each A and B share outstanding, and of each security on deposit in the funds, and to direct the trustee, in specific written instructions, to redeem any or all outstanding certificates of combination A and B shares. Plaintiff's sole compensation for these managerial services, and others not herein enumerated, consisted of separate B shares, delivered to it by the trustee at the same time the inseparable combination A and B shares were delivered by the trustee to the distributor. Plaintiff was entitled to receive 18 B shares for each 100 B shares that were delivered to the distributor. These separate B shares were issued only to plaintiff and none of them were ever sold.

5. Plaintiff was entitled to receive from the trustee, as payment for its services performed as manager of Funds H–27 and B–28, separate B shares in amounts and on dates as follows:

	Separate B Shares Receivable		*Date Receivable*
Fund H–27	3, 600		September 3, 1927
	2, 700		" 19, "
	3, 600		" 23, "
	3, 600		October 10, "
	3, 600		" 28, "
	5, 400		November 17, "
	3, 600		December 5, "
	6, 300		" 19, "
	3, 600		" 29, "
		36, 000	
	3, 600		January 6, 1928
	3, 600		" 10, "
	3, 600		" 19, "
		10, 800	
		46, 800	
Fund B–28	9, 000		February 1, 1928
	9, 000		" 9, "
	9, 000		March 9, "
	4, 500		April 25, "
	4, 500		May 15, "
	1, 800		July 8, "
		37, 800	

The opening bid on the combination A and B share on September 3, 1927, when plaintiff became entitled to its first B shares, was 23¼. The price asked was 23¾.

The prices bid and asked on the dates in 1928 when plaintiff became entitled to its B shares are as follows:

	Date	*Bid*	*Asked*
Fund H–27	1/6	26⅛	26⅜
	1/10	26¼	26¾
	1/19	26½	27
Fund B–28	2/1	21⅝	22½
	2/9	21⅝	22⅛
	3/9	21⅝	22⅛
	4/25	23	23½
	5/15	23	23½
	7/8	21⅜	22⅜

Each separate B share in Fund H–27 was worth at least the following amount in dollars on the date it was receivable:

1928	
1/6	8⅛
1/10	8¼
1/19	8½

Each separate B share in Fund B–28 was worth at least the following amount in dollars on the date it was receivable:

1928	
2/1	3⅝
2/9	3⅝
3/9	3⅝
4/25	5
5/15	5
7/8	3⅜

On February 14, 1928, permanent certificates for 46,800 B shares in Fund H–27 were issued and delivered to plaintiff. On November 3, 1928, similar certificates for 37,800 B shares in Fund B–28 were issued and delivered to plaintiff.

6. The trustee, with respect to Funds A–27, C–27, F–27, H–27, and B–28, timely filed federal fiduciary income tax returns for the calendar year 1928 for each of the five trust funds as simple trusts, and reported no tax due thereon. The Commissioner of Internal Revenue subsequently determined that the trust funds were associations taxable as corporations and found a deficiency in the returns. By appropriate sixty-day letters, he notified the trustee of proposed deficiencies upon each of the returns filed, and appeals therefrom were subsequently filed with the United States Board of Tax Appeals. The parties thereto, by their respective counsel before the Board, thereafter filed with the Board stipulations and agreements that certain specified deficiencies might be assessed and collected. The Board decided and ordered that the trustee was liable for the agreed deficiencies in each of the several proceedings.

Pursuant to the Revenue Act of 1928 and the Treasury Regulations promulgated under said Act, the trust funds were associations taxable as corporations for the purposes of determining the federal income tax liability thereof for the

calendar year 1928 and determining whether or not plaintiff should have included in its net income on its 1928 federal income tax return any part of the income earned by said funds.

7. On March 15, 1928, plaintiff filed its federal corporation income tax return for the calendar year 1927, reporting a total gross income of $10,939.65, deductions of $754.36, a net income of $10,185.29, and a total tax liability of $1,105. The return was prepared upon the accrual basis. Included among the items making up the said gross income were two items, representing compensation as manager of Insuranshares funds, set forth as follows:

10. (a) Compensation as Manager of Insuranshares Funds	--------
(b) Payment received in "B" shares of Insuranshares Funds	$1.00
(c) Distributive share in Insuranshares Trust Funds on "B" shares	8,795.25

Item 10 (b) above was the balance of an amount set up on plaintiff's books as the value of the "B" shares of Insuranshares trust funds, which amount was set up at one cent a share and against which a reserve was set up in an amount one dollar less than the amount set up as at one cent a share, leaving one dollar shown by the books as income which was brought into the tax return. Item 10 (c) above consisted of five separate items as follows:

Domestic dividends attributable to the "B" shares of Fund C-27 owned by plaintiff	$17.55
All other net income attributable to the "B" shares of Fund C-27	2,632.50
All other net income attributable to the "B" shares of Fund A-27	2,959.20
Similar income attributable to the "B" shares of Fund F-27	2,754.00
Similar income on the "B" shares of Fund H-27	432.00

8. On March 15, 1929, plaintiff filed its federal corporation income tax return for the calendar year 1928, reporting thereon a total gross income of $238,879.63, deductions amounting to $39,548.97, a net income of $199,330.66, and a total tax liability of $23,919.68. The return was filed upon the accrual basis. The tax so reported was paid in four installments of $5,979.92 each on the 15th of March, June, September, and December 1929. Included among the items

making up the total gross income reported upon the return were two items as follows:

10. (a) Compensation as manager of Insuranshares Funds—B Shares........................ $143, 283. 23
(b) Undistributed income of Insuranshares Funds—B Shares........................ 82, 038. 75

Item 10 (b) represented plaintiff's *pro rata* interest by reason of its ownership of B shares in the income earned by the trust funds during the year 1928, and item 10 (a) represented the value of B shares received as compensation by plaintiff as manager of the trust funds. Item 10 (a) consisted of two items of income of plaintiff as manager for the five trust funds, one, the B shares earned in the year 1927 based on a total value of $86,395.50, of which $1.00 had been included in plaintiff's 1927 return as above stated, and the other, compensation earned in the year 1928 in the form of B shares to which plaintiff assigned a total value of $56,888.73. The amount of $86,395.50, representing values assigned to B shares earned in 1927, was allocated as follows: 5,400 shares in Fund A–27 at one cent each, $54; 5,850 shares in Fund C–27, $58.50; 16,200 shares in Fund F–27, $25,308; 36,000 shares in Fund H–27, $60,975, making a grand total of 63,450 shares with a total value of $86,395.50, of which $1.00 had been included in the 1927 return, leaving $86,394.50 as the amount included in the 1928 return. The item of $56,888.73 represented the value placed on the 10,800 B shares in Fund H–27 of $41,688, and a value of $15,200.73 on 37,800 B shares in Fund B–28.

9. The method plaintiff used to fix the value of the B shares was to determine the total fair market value of the underlying securities in the fund on the date of deposit, after deposit, and then to divide the total number of B shares, both separate and inseparable, issuable at that date, into that sum, after first deducting $20 for the par value of each A share.

10. On March 12, 1931, plaintiff filed with the collector of internal revenue a claim for refund of $9,844.65 for the calendar year 1928, stating as grounds therefor the following:

Taxpayer claims this refund if and only if Insuranshares Trust Funds, A, C, F, H and B—which filed fidu-

ciary returns as non-taxable trusts are held to be associations subject to Corporation Income Tax as proposed in New York Division (2nd Dist.) Letters of 6/17/30, which tax if imposed would subject this corporation to double taxation as under advice of counsel it as a holder of certificates of the above noted Funds, reported and paid tax upon its proportionate share of the net income of the Funds as a beneficiary.

This claim is filed to protect this Taxpayer against limitations.

The Commissioner of Internal Revenue did not consider the merits of plaintiff's formal claim for refund until the summer and autumn of 1933 and after the entry on May 23, 1933, of final decisions and orders in those Board of Tax Appeals proceedings mentioned in finding 6, *supra*. In the summer of 1933 the Commissioner considered the effect upon plaintiff's income tax liability for the year 1928 of an elimination from gross income, as shown upon its 1928 income tax return, by allocating to the year 1927, $86,394.50 or more of the value of $143,283.23 of the B shares included in that return, as income received by plaintiff during 1928.

11. Conferences were held between representatives of the Commissioner and of plaintiff on December 26, 1933, July 11, 1934, and July 20, 1934. On July 24, 1934, prior to the rejection by the Commissioner of the formal claim for refund filed March 12, 1931, plaintiff filed with the Commissioner an unsworn document consisting of a three-page letter, together with attached exhibits, stating, in effect, that plaintiff's claim for refund filed March 12, 1931, should be increased in amount to $20,211.99, with interest, and, further, that such increase resulted from deductions from plaintiff's gross income for the year 1928 of the sum of $86,394.50, representing the market value of the B shares claimed to have been earned by plaintiff in the year 1927 as its compensation for the management of the several trust funds.

12. Plaintiff was notified by Bureau letter of March 21, 1935, that its claim for refund of $9,844.65 for the year 1928 "will be disallowed" for the stated reason that its taxable income for the year 1928 had been understated rather than overstated, and that the federal income tax in question had not been overpaid. The Commissioner rejected plaintiff's

claim for refund on April 19, 1935, and plaintiff was so advised by registered letter of the same date. No part of that claim has ever been allowed.

By letter dated September 17, 1935, plaintiff applied for the reopening of its claim for refund and on December 30, 1935, the Commissioner denied that application. On January 20, 1936, plaintiff protested the denial of its application for a reopening of the action, and on June 26, 1936, the Commissioner affirmed his prior refusal to reopen it.

The court decided that the plaintiff was not entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

Plaintiff in 1927 and 1928, then known as the Insuranshares Management Company, entered into agreements with Insuranshares Corporation, herein called the distributor, and Farmers Loan and Trust Company, herein called the trustee. By these agreements five investment funds were set up in the hands of the trustee. The funds consisted of stocks of banks, trust companies and insurance companies designated by plaintiff, acquired by the distributor and deposited with the trustee. The two funds involved here were H–27, set up in 1927, and B–28, set up in 1928. Under the agreements, plaintiff's function was to act as manager, selecting the securities to be acquired and placed in the fund, and directing their subsequent disposition and performing numerous other functions as manager of such a trust, as set out in finding 4. The distributor's function was to acquire the securities designated by plaintiff, deposit them with the trustee, and receive in return certain shares in the fund, which shares it might retain or market. The trustee's function was to hold, as trustee, the securities deposited with it by the distributor and to issue the shares hereinafter described.

Under each agreement, the trustee was to issue two different kinds of participating shares. One kind, to be issued to the distributor, for sale to the public, if it so desired, was an inseparable combination of so-called A and B shares. Each A share had a par value of $20. B shares had no par value. Each A share was entitled to a noncumulative semiannual distribution out of the net income of the fund, at the rate of 3% per annum. Each B share was entitled, after the rights

of the A shares had been satisfied, to a *pro rata* distribution of at least 20% of the remaining net income, and of so much more of it as should be determined by plaintiff and approved by the distributor. Each A share was entitled, in liquidation, to a distribution of $20, its par value, and the holder of a combination A share and B share was entitled on two specified dates per year, on seventy days' notice, to turn in his share certificate and receive, either in cash or securities, whichever should be elected by plaintiff, the value of his shares, less a charge of two dollars for each A share, and less a further charge for redemption of one-third of one percent. In short, the A share part of the inseparable combination had the qualities of a preferred stock, and the B share part of it had the qualities of a common stock, comprising all rights to income above the noncumulative 3% per annum, and all rights to increases in the capital of the fund.

The other kind of share which each agreement called for was a separate B share, which had the same rights as the B share in the combination just described. These shares were to be issued only to plaintiff, and were to be its sole compensation for the management of the trust. It was to receive 18 B shares for every one hundred B shares issued to the distributor in the combination shares.

At the time each fund was set up, the then market value of the securities deposited with the trustee was divided by twenty, the dollar par value of the A shares, and a number of combined shares equal to the quotient was issued. An immediate liquidation would, then, have permitted no distribution on the B shares either to plaintiff, or to the holder of the combined share. When additional securities were placed in the funds, and additional certificates were issued, the price of the shares sold was adjusted to prevent dilution of the investments of earlier investors and to avoid giving later investors a share in any increment already accrued to the fund.

Plaintiff became entitled in 1927 under the H-27 agreement to 36,000 B shares. The shares were not actually issued to it until 1928. In its corporation income tax return for 1927, filed March 15, 1928, on the accrual basis, it returned as income on account of these B shares one dollar, having valued

them at one cent each and having set up a reserve against even that valuation of all of it except one dollar.

In 1928, plaintiff became entitled to 10,800 B shares under the H–27 agreement and 37,800 shares under the B–28 agreement. In its return for that year it stated a value of $41,688 for the former shares, $3.85 per share, and a value of $15,200.73 for the latter shares, 40.2 cents per share. It also included, in its 1928 return, B shares to which it had become entitled in 1927, viz, 63,450 B shares in H–27 and three other funds, of a total value of $86,395.50, deducting one dollar from that sum because of the return of one dollar made in 1927.

The total of $143,283.23, then, represented plaintiff's valuation of the B shares to which it became entitled during the two years 1927 and 1928, and $86,394.50 of that income, accounting for $10,361.91 of its tax, was attributable to 1927. It claims therefore that that part of its tax should be refunded, since it was not obliged to pay it as a 1928 tax, and the defendant's right to collect it as 1927 tax is barred by the statute of limitations.

Plaintiff also claims that a sum of $82,038.75 which it included in its 1928 return as "undistributed income of Insuranshares Funds-B shares" which was plaintiff's *pro rata* interest, by reason of its ownership of separate B shares, in the income earned by the five trust funds during 1928, as distinguished from the B shares themselves which it received as compensation during 1928, was improperly included, or should have been deducted, as corporate dividends, since the funds themselves were taxed as corporations upon their income. Since this sum of $82,038.75 accounted for $9,844.65 of the tax plaintiff paid in 1928, it asks also for a return of that amount, making a total amount of $20,206.56 claimed for return.

The defendant's contentions are:

1. There was no sufficient claim for refund as to the asserted overassessment of $82,038.75 and overpayment of $9,844.65.

2. There was no timely claim for refund as to the asserted overassessment of $86,394.50 and overpayment of $10,361.91.

3. If either or both of the foregoing contentions are found to be without merit, still plaintiff is not entitled to recover, because the B shares to which it became entitled in 1928

had a fair market value of more than the total income returned by plaintiff for 1928, and therefore plaintiff underpaid, rather than overpaid, its 1928 tax.

The defendant does not seriously contest plaintiff's contention that the $82,038.75 item in the 1928 return was deductible as a dividend of a domestic corporation. Revenue Act of 1928, sec. 23 (p). The funds were taxed on their incomes as domestic corporations within the meaning of the statute, and it follows that their distributions should be treated as those of domestic corporations, not taxable to the shareholders receiving such distributions.

As to the defendant's first contention, that the refund claim timely filed, and quoted in finding 10, was insufficient, we think that the claim was sufficient. The claim was conditional, but the contemplated condition was that the funds should be taxed as domestic corporations, and that happened. That such taxation should be, strictly, double taxation of plaintiff was not really a part of the condition. It follows that unless plaintiff underpaid its taxes for 1928 in some other respect, it would be entitled to a refund of the $9,844.65 tax paid on the $82,038.75 item of income.

The defendant's second contention, relating to the timeliness and sufficiency of plaintiff's claim for refund of taxes paid in 1928 on 1927 income, presents a more serious question. It will be remembered that plaintiff filed its first claim for refund of 1928 taxes on March 12, 1931, which was within the permissible two-year period after payment of the tax. Revenue Act of 1928, sec. 322 (b) (1). Its claim relating to its return of 1927 income in 1928 was not filed until July 20, 1934, more than two years after the taxes had been paid. Plaintiff contends that this claim was a permissible amendment of its previous timely claim. We do not think so. The timely claim was specific, both as to the item of income to which it related and as to the asserted ground for refund. The 1934 claim related both to a different item of income and a different ground for refund. It was not an amendment, but a new claim, filed late. *United States* v. *Andrews*, 302 U. S. 517; *Hanna Furnace Corp.* v. *United States*, 90 C. Cls. 439; *Guantanamo Sugar Co.* v. *United States* (decided April 7, 1941, and not yet reported). The fact that the

previous timely claim had not yet been acted upon by the Commissioner of Internal Revenue at the time the later claim was filed is immaterial. The Commissioner has no power to waive the statute of limitations after it has run. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528.

The language of the court in *Pink* v. *United States*, (C. C. A. 2d) 105 F. (2d) 183, 187, relied upon by plaintiff, gives it no aid in this case. The court there said that where the original claim filed is such that the facts upon which the amendment is based would necessarily have been ascertained by the Commissioner in investigating the merits of the original claim, the amendment may be made after the statute has run. Here the investigation of the timely claim as to the nontaxability of dividends of domestic corporations would not lead the Commissioner to suspect that plaintiff had done the unusual thing of including 1927 income in its 1928 return. We conclude, therefore, that plaintiff's claim for refund of $10,361.91 taxes paid on its return of $86,394.50 of income in 1928, which was 1927 income, is barred because no timely claim for refund was made to the Commissioner of Internal Revenue. However, as we shall see hereinafter, even though plaintiff's claim for refund as to the 1927 income on which it paid 1928 taxes had been timely filed, the result would not be changed because even in that event plaintiff did not overpay its 1928 taxes.

The defendant's third contention is, as we have said, that regardless of the merits of either or both of plaintiff's asserted grounds for recovery, plaintiff underpaid rather than overpaid taxes on its 1928 income. It will be remembered that plaintiff in 1928 became entitled to 10,800 B shares in Fund H–27 and 37,800 B shares in Fund B–28. In the return it valued the former at $41,688 and the latter at $15,200.73, a total of $56,888.73. It arrived at these valuations by taking the market value of the underlying securities on the dates in question, subtracting from that sum the product of twenty times the number of A shares and dividing the remainder by the number of B shares. This, plaintiff claims, was its total taxable income in 1928, so far as relates to this controversy. We have held that as to $86,394.50 more of its return, which was 1927 income, plaintiff may not have a refund because it did

not file a timely claim. It returned and paid taxes on $225,-321.98. The defendant claims that the 48,600 shares had a fair market value, not of $56,888.73 as returned by plaintiff, but of at least $225,321.98, and that therefore plaintiff did not overpay its tax.

Our question then is whether these B shares had an average fair market value of at least $4.64 per share, which would justify all the income that plaintiff returned in 1928, or at least, $2.86, which would absorb all the income as to which plaintiff is not barred by limitation from seeking a refund.

No one could get the separate B shares from the trustee except plaintiff, and it never sold them nor offered them for sale. No offer to plaintiff for them is shown. The B shares were bought and sold only in the inseparable combination with A shares.

Since the combined shares were not listed on any exchange, but were sold only "over the counter", no record is available of actual sale prices, but only of bid and asked quotations, as that is the practice of the financial journals which publish such reports. The following tabulation shows the number of B shares and the dates in 1928 on which plaintiff became entitled to them, the bid and asked quotations on the combined shares on those dates, as shown by the joint exhibit of the parties prepared from financial reports current in 1928, and the values of the B shares, assuming that the A shares accounted for $20 of the value of the combination, or in the alternative, of $18 of the combination.

Date shares receivable	No. of shares receivable	Bid	Asked	Value of B shares	
				A at $20	A at $18
Fund B-28					
February 1	9,000	21⅝	22½	$14,625	$32,625
February 9	9,000	21⅝	22⅛	14,625	32,625
March 9	9,000	21⅝	22⅛	14,625	32,625
April 25	4,500	23	23½	13,500	22,500
May 15	4,500	23	23½	13,500	22,500
August 8	1,800	21⅜	22⅜	2,475	6,075
	37,800			73,350	148,950
Fund H-27					
January 6	3,600	26⅛	26⅜	22,050	29,250
January 10	3,600	26¼	26¾	22,500	29,700
January 19	3,600	26½	27	23,400	30,600
	10,800			67,950	89,550

Assuming the A shares to have had a par value of $20, which plaintiff seriously urges that they had, the bid price for the B share portion of the combination at the time that plaintiff became entitled to its B shares was $141,300, as against the $56,888.73, at which plaintiff valued them in its return. But the market value of the A share portion of the combination was not $20. It could not have been more than $18, since the voluntary cashing in of a combination share by a shareholder was subject to a discount of $2 from the $20 par value. Counting the value of the A shares at $18, the tabulation shows that the B shares had a value of $238,500, which is more than the $225,321.98 which plaintiff returned and on which it paid taxes.

In fact the A shares in these funds had a market value of less than $18 per share. There would have been no reason why an investor would pay $18 for a preferred stock with a noncumulative return of 3% on a $20 par value, and a liquidating value of $18 if he desired to withdraw his cash from the enterprise. A better return could have been obtained on government bonds,[1] municipal bonds,[2] public utility bonds [3] or savings bank deposits,[4] forms of investment just as convenient. The investor in these combination shares was looking to the increment in value of the underlying securities and to their dividends. The increases in value of the bank, trust company and insurance stocks comprised in these trusts, had, over the preceding years, been regular and substantial. Their cash and stock dividends had been large. The opportunity for the ordinary investor to obtain an interest in a selected list of such stocks, and to have the list managed by plaintiff must have been a principal attraction. The fact that the securities initially deposited in the H-27 trust on September 1, 1927, had cost the distributor an amount equal to $20 for each combined share, yet the shares had a bid and

[1] The rate on long-term government bonds was 3.33%. Annual Report of the Secretary of the Treasury, June 30, 1939, p. 486.

[2] 4.02%, based on a selected list. United States Statistical Abstract, 1935, p. 284; The Bond Buyer.

[3] The figure given in the Standard Bond Investment Book (Standard Statistics Co.), based on 4,000 better grade issues, is 5.395%. The United States Statistical Abstract, 1935, p. 284, lists 4.68%, based on 15 better grade issues.

[4] In New York the average return was 4.39%. Savings Banks Association of New York, Annual Report, 1929.

asked price of 23¼ and 23¾, respectively, on September 3, proves that the management trust set up by plaintiff added substantially in the mind of the investor to the bare value of the separate stocks in the trust fund. Plaintiff's method of valuation assumes that the investor's principal interest at the time of putting his money in is in what he would realize on it in a forced liquidation. If that had been first in the minds of the investors in the case of these shares, they would not have invested at all.

As to the earning power of the stocks in the trust, plaintiff's income of $82,038.75 from its class B shares for 1928 is significant. It had 48,600 such shares for the whole year, and 37,800 other such shares, most of them for the principal part of the year. Its average dividend from them was almost one dollar a share. The investor in the combined share was, similarly, receiving one dollar a share on the B part and 60 cents on the A part. It would have been difficult to convince him that, as plaintiff contends, the A part of the combined share was worth $20 and the B part $1.18, on the average, which was the value attributed to the B shares by plaintiff in its tax return.

An expert offered by the defendant placed the value of the A shares at $7.50 and attributed all the rest of the market price of the combinations to the B shares, thus giving them a market value of from $13.50 to $21, at different relevant times. This expert was, at the time he testified, the manager of Insuranshares Certificates, Inc., the company formed when Insuranshares trust certificates were liquidated in the fall of 1929 for the purpose of forming a corporation whose stock would be listed on the New York Stock Exchange.

It is not necessary for us to determine the value so definitely. We are, as we have indicated, convinced that the aggregate value of the B shares in these two funds, received by plaintiff in 1928, was more than $225,321.98. Plaintiff having paid taxes on that sum, did not overpay its tax and is not entitled to recover. Its petition will, therefore, be dismissed. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

LOUISIANA DELTA CATTLE CO., INC., v. THE UNITED STATES

[No. 43575. Decided May 5, 1941]

On Defendant's Motion to Dismiss

Flood control; taking of property; consequential damages.—Where in an action for damages to property by reason of the Flood Control, or Jadwin Plan, on the Mississippi River, there is no allegation in the petition of a past or consummated inundation or damage, and where the damage alleged is prospective upon the "abandonment or removal of the previous levees around said property," which plaintiff charges defendant "purposes to accomplish and obtain"; it is *held* that the plaintiff is not entitled to recover.

Same.—The mere fact that the value of property is injured or affected by some act which the Government proposed to do in the future does not establish a "taking" within the meaning of the Fifth Amendment.

Danforth v. *United States*, 308 U. S. 271; *United States* v. *Sponenbarger, et al.*, 308 U. S. 256; *Bennington County Savings Bank* v. *United States*, 91 C. Cls. 160; *Kirch* v. *United States*, 91 C. Cls. 196; *Matthews, Trustee*, v. *United States*, 87 C. Cls. 662, cited.

Mr. Camden R. McAtee for the plaintiff.

Mr. P. M. Cox, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant.

The facts sufficiently appear from the opinion of the court.

GREEN, *Judge*, delivered the opinion of the court:

Plaintiff is a corporation, and in its petition alleges that it is the owner of certain tracts of land, described at length therein, embracing 4,663.52 acres located adjacent or near the Mississippi River, and that at the time of the acquisition of this real property the same was defended and protected against flood or water submergence by public levees along the banks of the Mississippi River upon said property whereby the property was arable and of value and subject to drainage of rainfall; that, notwithstanding said conditions so existing, the defendant by its authorized agencies, on or about July 13, 1931, and thereafter, and

acting within the scope and under authority of the Flood Control Act did select and locate a set-back or new levee line as part of a certain procedure adopted by defendant and known as the Jadwin Plan of Flood control of the Mississippi River; that the new levee, known as the West Point New Levee, was and is located between stations 534+40 and 714+28.6, and lies on the west side of the Mississippi and adjoins and contacts other previously existing levees, and is intended to, does and will withdraw levee protection to the real property of plaintiff and cause the Mississippi River permanently to overflow and destroy same; that the new levee site was and is duly approved by the authorized authorities of the State of Louisiana, and was constructed by the defendant and its agencies under certain contracts made pursuant to the Flood Control Act and Jadwin Plan, by which work was begun on or about September 1, 1931, and whereby the new levee was tied into the previously existing levees in or about the months of July or October 1934, and drainage outlets previously existing were stopped and made ineffective; that by the West Point New Levee defendant has materially lessened and shortened the west bank levee line on the Mississippi River and has thereby taken from plaintiff and placed on the river side all lands and improvements of plaintiff lying east of the West Point New Levee, within the intendment and meaning of the Fifth Amendment to the Constitution and the Flood Control Act.

Plaintiff states, by the West Point New Levee constructed and tied to existing levees at both ends, defendant has segregated and excluded all land and improvements of plaintiff from levee protection and from drainage, whereby the land and improvements, through lack of drainage, will be inundated by the natural rainfall, which averages sixty inches annually, and converted into a bog or marsh unfit for cultivation or other use, and whereby, in event of abandonment or removal of the previous levees around the property, which abandonment or removal plaintiff alleges and charges defendant purposes to accomplish and obtain, the river waters will be induced to break through upon the lands of plaintiff in the establishment of a new channel thereon, thereby putting the lands permanently in the bed of the

river, or establishing constant flowage rights thereon, and by the acts of the defendant, the lands of plaintiff will be made unfit and entirely destroyed.

The plaintiff further states that by the adoption of the Jadwin Plan of Flood Control and the enactment of the Flood Control Act, as amended, the defendant has assumed full responsibility for the control of the flood waters of the Mississippi River and its tributaries; that by its acts aforesaid, the defendant has deprived and does deprive the plaintiff of levee protection on the west bank of the Mississippi River, and of drainage as previously existing and enjoyed by the plaintiff, and has exposed the lands and improvements of the plaintiff to overflow of the waters and has caused the lands and improvements of the plaintiff to be and remain unprotected in the making of the new channel, and thereby to be made entirely without further value to plaintiff, and to be taken for public use, damaged and destroyed, without making compensation therefor to plaintiff.

Plaintiff further states that before the construction of the West Point New Levee, and on and after July 13, 1931, the land and property of plaintiff, with improvements, were worth not less than $159,002.25; but that since its construction is without saleable value and the use thereof for all practical purposes has been taken and destroyed, to the consequent loss or damage of plaintiff in the full value thereof, as above stated.

The defendant moves to dismiss the petition and the case has been submitted on defendant's motion. The motion does not set out the grounds thereof, which are stated in the written argument in support of the motion.

It will be observed from the statements in the petition that the action is based upon an implied contract, alleged to exist, to pay compensation for the reasonable value of the real property of plaintiff claimed to have been taken or destroyed by defendant for the purposes of public use and in the execution of its flood control act.

The claim of the plaintiff is expressly stated in the petition as founded upon the Fifth Amendment to the Constitution and in connection with the act of Congress for the control of floods, also referred to in the petition.

The motion of the defendant is equivalent to a demurrer on the ground that the petition does not state a cause of action, and will be so treated.

We have set out all the allegations of the petition that are necessary to be considered in ruling on the motion. It will be seen that there is no allegation of a past or consummated inundation or damage.

While the petition alleges that the value of plaintiff's land has been destroyed this allegation is not based upon anything the Government has done but merely upon what it proposes to do and upon what plaintiff alleges will happen in the future. Everything alleged is prospective upon the "abandonment or removal of the previous levees around said property" which plaintiff charges defendant "purposes to accomplish and obtain." There is no allegation that anything has been done so far that has actually injured or impaired plaintiff's property or deprived plaintiff of its use in whole or in part.

We do not think that the mere fact that the value of the property is injured or affected by some act which the Government proposed to do in the future establishes a taking in a constitutional sense.

In *Danforth* v. *United States*, 308 U. S. 271, 285, the court said:

> A reduction or increase in the value of property may occur by reason of legislation for or the beginning or completion of a project. Such changes in value are incidents of ownership. They cannot be considered as a "taking" in the constitutional sense.

This rule, we think, applies directly to the instant case.

In *United States* v. *Sponenbarger, et al.*, 308 U. S. 256, the court held that a general plan of flood control such as that proposed in the Jadwin Plan does not require the Government, under the Fifth Amendment, to pay land owners for damages which might result from conjectural major floods.

The decision by this court in *Bennington County Savings Bank* v. *United States*, 91 C. Cls. 160, and the decision in the *Sponenbarger* case, *supra*, were rendered upon the facts which included some matters which do not so far appear in the case before us, but we think that the general trend of the

decisions in the two cases last cited is in line with the *Danforth* case, *supra*, and also the decisions hereinafter cited.

In *Kirch* v. *United States*, 91 C. Cls. 196, 202, it was held that "the flood-control act in itself furnishes no legal basis for the payment of consequential damages by reason of depression in the market value of property," but consequential damage by reason of depression in the market value of property is just what plaintiff is trying to recover in this case.

In numerous cases we have had before us actions to recover for consequential damages by reason of the adoption of the so-called Jadwin plan for control of the floods of the Mississippi River and in all of them where the damages were consequential and prospective in their nature a recovery has been denied.

In *Matthews, Trustee*, v. *United States*, 87 C. Cls. 662, 720, it is said:

> Contemplated or prospective encroachments, the direct effect and consequences of which are problematical and conjectural, do not give rise to an enforceable obligation to compensate. Only consummated acts which actually deprive an owner of property or of valuable existing property rights, or acts so definite in character as to show a clear intention to take the property or property rights, or to place thereon such a permanent servitude not theretofore existing as will deprive the owner of the actual or profitable use thereof, can be held the basis of an implied promise to pay (citing a number of cases).

If we were to adopt the rule for which plaintiff contends the Government could be held liable even though the act under which it was proceeding was repealed or the plan for some other reason abandoned, and nothing was ever done by the Government which in any way affected or injured the plaintiff's rights in relation to its property.

Our conclusion is that the plaintiff's petition does not state a cause of action and that it must be dismissed. It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

TASTY BAKING COMPANY, A CORPORATION, v. THE UNITED STATES

[No. 43725. Decided May 5, 1941]

On the Proofs

Processing tax; interpretation of section 602½ of the Revenue Act of 1934.—Where plaintiff, a corporation engaged in the manufacture and sale of bakery products, was assessed and paid processing taxes on the processing of coconut oil under section 602½ of the Revenue Act of 1934, which oil had been previously processed in the United States by the vendor thereof prior to the effective date of said act; it is *held* that the plaintiff is not entitled to recover, following the decision of the Circuit Court of Appeals in *Loose-Wiles Biscuit Company* v. *Rasquin, Collector*, 20 Fed. Supp. 805; certiorari denied, 305 U. S. 611.

Same; interpretation in Treasury Regulations.—Where the intention of Congress in a Revenue Act is in doubt, and where on two different occasions after the issuance of Treasury Regulations interpreting the doubtful language used in the act, Congress enacted subsequent legislation on the same subject without disapproving the Treasury interpretation; it is *held* that there was a sufficient basis for holding "that the Treasury Regulations promulgated under the statute were a reasonable construction of the statutory language."

Same; denial of writ of certiorari.—While the Supreme Court has stated that denial of a writ of certiorari adds no authority to the opinion sought to be reviewed, where the question involved in the petition for certiorari was upon a final judgment of the lower court and was narrowly defined; it is *held* that such denial is of some persuasive value in the determination of said question.

The Reporter's statement of the case:

Mr. Hugh Satterlee for the plaintiff. *Messrs. Alfred S. Weill, Thorpe Nesbit, Stephen T. Dean* and *Weill, Satterlee, Green & Morris* were on the briefs.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson, J. H. Sheppard,* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows:

1. The plaintiff is, and at all times hereinafter mentioned was, a corporation existing under the laws of the Commonwealth of Pennsylvania and engaged in the manufacture and sale of bakery products.

2. Plaintiff owned at 11:40 a. m., May 10, 1934, the following materials:

396,783 lbs. of 76° neutral, nonplastic coconut oil;
108,229 lbs. of 110° neutral, nonplastic coconut oil;
41,252 lbs. of Durkee's Ice-It; and
5,151 lbs. of Best Foods Shortening.

3. Plaintiff purchased subsequently to 11:40 a. m., May 10, 1934, the following materials:

863 lbs. of 76° neutral, nonplastic coconut oil;
8,622 lbs. of Best Foods Shortening; and
62,663 lbs. of Durkee's Ice-It.

4. Plaintiff used all the materials mentioned in findings 2 and 3 hereof in the manufacture of its bakery products during the period beginning at 11:40 a. m., May 10, 1934, and ending January 31, 1935, duly filed monthly tax returns showing such use, and paid the Government processing taxes on such use as follows:

Date:	*Amounts paid*
July 31, 1934	$4, 450. 35
Aug. 31, 1934	2, 057. 38
Sept. 27, 1934	2, 376. 84
Oct. 22, 1934	2, 481. 74
Nov. 21, 1934	2, 771. 22
Dec. 20, 1934	2, 003. 14
Jan. 22, 1935	1, 875. 39
Feb. 11, 1935	293. 70
Total	18, 309. 76

5. All the materials mentioned in findings 2 and 3 were processed as hereinafter more particularly described, in the United States by persons other than plaintiff, to wit, plaintiff's vendors, prior to 11:40 a. m., May 10, 1934, from crude coconut oil derived from copra grown in the Philippine Islands, and said vendors in processing said materials intended them for sale. Plaintiff's use of said materials in the manufacture in the United States of its bakery products was the first domestic use of them after 11:40 a. m., May 10, 1934, in the manufacture of an article intended for sale.

6. The methods of processing by plaintiff's vendors of the materials involved in this suit, and referred to in findings 2 and 3, were as follows:

> *76° Neutral, Non-Plastic Coconut Oil.*—Crude coconut oil is first refined, which consists of reducing the acid and impurities in the oil by the application of caustics, or alkalis and steam. The oil is next subjected to a bleaching process consisting of the application of Fuller's Earth, carbon, and steam, which leaves it water-white. The oil is next deodorized, which involves subjecting it to a high degree of vacuum and pre-heated steam. The resultant product is 76° neutral, non-plastic coconut oil.
>
> *110° Neutral, Non-Plastic Coconut Oil.*—The crude coconut oil is refined and bleached as described above. It is then hardened by piping hydrogen through it and, at the time of hardening, 4% to 5% of cottonseed oil is added to give it the 110° melting point. The hardened material is then deodorized, following which it is plasticized, which consists of running it over a chill roll and beating it. The resultant product is 110° neutral, non-plastic coconut oil.
>
> *Best Foods Shortening.*—Best Foods Shortening is a combination of coconut oil, peanut and palm oils. The crude coconut oil is processed and put into a fine hydrogenate, as is the palm oil. A mixture containing 70% coconut oil and 30% palm oil is then made from the hydrogenates and to this is added peanut oil. The resulting mixture is then deodorized and plasticised, the resultant product being Best Foods Shortening consisting of 79% coconut and palm oils and 21% peanut oil.
>
> *Durkee's Ice-It.*—Durkee's Ice-It is made under the same formula and by the same processing as is described for Best Foods Shortening.

7. On April 10, 1935, the plaintiff, in accordance with law, duly filed with the Collector of Internal Revenue, Philadelphia, Pennsylvania, for transmission to the Commissioner of Internal Revenue its Claim for Refund of the aforesaid amounts shown in finding 4, aggregating $18,309.76, and in support thereof stated the following reasons:

> Section 602½ (a) of the Revenue Act of 1934 provides for the imposition of a tax "upon the first domestic processing of coconut oil * * * or of any combination or mixture containing a substantial quan-

tity of * * * such oils, with respect to any of which oils there has been no previous first domestic processing," and defines the term "first domestic processing" to mean "the first use in the United States in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed." Regulations 48, Art. 1 (1) provides that the term "first domestic processing means the first use in the United States on or after the effective date of the Act." Section 803 of the Revenue Act of 1934 provides, "Except as otherwise provided, this Act shall take effect upon its enactment." May 10, 1934, was the date of enactment of the Act and it contained no exceptions in respect to the tax imposed by Section 602½.

Claimant avers that the provision of the Regulations that the tax applies in the case of "first use in the United States * * * after the effective date of the Act" is unwarranted by law, erroneous and therefore without effect; that Section 602½ of the Revenue Act of 1934 expressly imposed the tax only in those cases where "there has been no previous first domestic processing"; that all of the product subjected to tax in this case had had such "previous first domestic processing" prior to May 10, 1934, that all of the $18,309.76 tax covered by this claim was paid by the claimant with respect to the use by claimant subsequent to May 9, 1934, of the above referred to refined coconut oil and combinations and mixtures containing coconut oil which, when acquired by claimant had had a previous first domestic processing; and that no part of such $18,309.76 was actually due and payable by claimant as a tax imposed by Section 602½ of the Revenue Act of 1934 or for any other reason.

8. On October 30, 1935, the Commissioner of Internal Revenue wrote plaintiff rejecting in full plaintiff's claim for refund. The Commissioner's letter reads as follows:

Reference is made to your claim for the refund of $18,309.76, representing tax paid under the provisions of section 602½ of the Revenue Act of 1934, upon the first domestic processing of coconut oil during the period May 1934 to January 1935, inclusive.

You contend that the amount was erroneously paid for the reason that the tax paid on the use, after May 10, 1934, of certain quantities of coconut oil and certain quantities of combinations or mixtures containing coconut oil, which were processed in the United States

prior to such time. You state that the coconut oil was converted into refined oil from crude oil prior to the effective date of section 602½ and that tax was paid on the use of stocks of such refined oil on hand at such time and use subsequent thereto. It is your contention that such use of the oil was not subject to tax within the meaning of section 602½.

Your attention is directed to Article 1 (k) (3) of Regulations 48, which provides as follows:

"The manufacture or production of an article intended for sale from an oil or oils upon which any of the processes enumerated in (1), above, have been performed either (A) prior to the importation of the particular oil, or (B) prior to the effective date of the Act."

Under this article of the regulations this office holds that taxable oil processed prior to the effective date of section 602½ of the Revenue Act of 1934, that is May 10, 1934, is subject to tax when used after such time in the United States in the manufacture of an article intended for sale.

Since in the instant case the coconut oil as well as the combinations or mixtures containing coconut oil were processed prior to May 10, 1934, and used subsequent to such time in the manufacture of an article intended for sale, they were correctly subject to tax upon such use.

Your claim is therefore rejected in full.

The court decided that the plaintiff was not entitled to recover.

JONES, *Judge*, delivered the opinion of the court:

Plaintiff, a Pennsylvania corporation engaged in the manufacture and sale of bakery products, seeks to recover the sum of $18,309.76 in taxes which were assessed and paid under Section 602½ of the Revenue Act of 1934 (48 Stat., 680, 763), on the domestic processing of coconut oil produced in the Philippine Islands.

The oil which is involved in this claim was owned by the plaintiff on May 10, 1934. It had been previously processed in the United States by the vendor from whom plaintiff purchased it, and it was then held in the plaintiff's stocks for the purposes indicated. The Internal Revenue Act in question

was approved May 10, 1934. Section 602½ of such act provides in part as follows:

> There is hereby imposed upon the first domestic processing of coconut oil, sesame oil, palm oil, palm kernel oil, or sunflower oil, or of any combination or mixture containing a substantial quantity of any one or more of such oils with respect to any of which oils there has been no previous first domestic processing, a tax of 3 cents per pound, to be paid by the processor.

The same paragraph defines the term "first domestic processing" as follows:

> For the purposes of this section the term "first domestic processing" means the first use in the United States, in the manufacture or production of an article intended for sale, of the article with respect to which the tax is imposed, but does not include the use of palm oil in the manufacture of tin plate.

The question at issue is whether the stocks of plaintiff on hand at the time such revenue act was passed and which had been processed theretofore by plaintiff's vendor, were subject to the tax in question.

The plaintiff contends that they were not subject to the tax. The Collector of Internal Revenue ruled that they were subject to the tax. The taxes were accordingly collected, and this suit is to recover the amount of the taxes thus paid, and which plaintiff claims were illegally collected.

The case turns on whether the term "first domestic processing" as used in the act refers to the first domestic processing in fact, or to the first domestic processing after the passage of the act.

If this issue were before us as a matter of first impression we would have doubt whether the Congress intended to tax oils in stocks that had previously been processed in the United States.

The part of the section first quoted, standing alone, would indicate that the Congress meant the first domestic processing after the passage of the act. The definition quoted from the last part of the same section, if standing alone, would naturally mean the first processing in point of time. As they must be construed together, the intention of the Congress is not altogether clear, especially in the light of the Treasury

Regulations and the subsequent implied approval of the Congress.

The various courts are not in agreement on the interpretation which should be given the language in question. The cases of *Armour & Co.* v. *Harrison*, 19 A. F. T. R. 1347 (N. D. Ill.) appeal dismissed 95 Fed. (2d) 993, and *Cincinnati Soap Co.* v. *United States*, 22 Fed. (Sup.) 141, (D. C. Ohio, 1938), hold that coconut oil stocks on hand and domestically processed before the passage of the Revenue Act of 1934 were not taxable. The cases of *Loose-Wiles Co.* v. *Rasquin, Collector*, 20 Fed. (Sup.) 805 (E. D. New York), 95 Fed. (2d) 438 (C. C. A. 2d), certiorari denied 305 U. S. 611, and *Colgate Palmolive Co. v. United States*, (Del.) (March 30, 1941, not yet reported) hold that such stocks were taxable.

Once conceding that the meaning of the language used in the act is in doubt, it becomes necessary to consider the regulations of the Treasury and subsequent acts of Congress as well as other matters that may throw light on a proper interpretation of the language of the act.

Following the enactment of the Revenue Act of 1934, Treasury Regulation 48 was issued, reading in part as follows:

> (1) First domestic processing means the first use in the United States on or after the effective date of the Act.

On two different occasions after the issuance of the regulation referred to, Congress enacted subsequent legislation directly relating to this tax without disapproving the Treasury interpretation and application of the tax to the first domestic processing occurring after the effective date of the Revenue Act of 1934.

The facts in the case of *Loose-Wiles Biscuit Company* v. *Rasquin*, *supra*, were very similar to the facts in the case at bar. Both involved coconut oil produced from materials grown in the Philippine Islands. Plaintiff in each case had purchased the commodity from a seller who prior to May 10, 1934, had put it through a refining process of such a nature as to make it suitable for use as shortening in the manufacture of bakery products.

In a well-reasoned opinion in the *Loose-Wiles* case the Circuit Court of Appeals for the Second Circuit, while admitting that "apart from the regulations * * * the language of the statute does leave it doubtful whether the Congress intended to tax a processing of the oils" which had been previously processed within the United States, at the same time found that there was a sufficient basis for holding "that the Treasury Regulations promulgated under the statute were a reasonable construction of the statutory language." It therefore held that the tax was collectible. The Supreme Court denied the application for a writ of certiorari.

While the Supreme Court has stated that denial of a writ of certiorari adds no authority to the opinion sought to be reviewed, we feel that denial of the writ in *Loose-Wiles Biscuit Co.* v. *Rasquin*, *supra*, is a factor of some persuasive value in determination of the instant question. The court is aware of the limited purposes for which writs of certiorari are granted by the Supreme Court, and the restricted significance of denials therof. *Hamilton-Brown Shoe Co.* v. *Wolf*, 240 U. S. 251; *United States* v. *Carver*, 260 U. S. 482; *Atlantic Coast Line R. R. Co.* v. *Powe*, 283 U. S. 401; *Stamey* v. *United States*, 37 Fed. (2d) 188; Rule 38, paragraph 5, Rules of the Supreme Court of the United States. However, it feels it worthwhile to indicate that the *Hamilton-Brown Shoe Company* case, wherein the Supreme Court apparently first had occasion to note the restricted significance of denials, involved refusal to review an interlocutory decree and that the court expressly recognized the nonfinality of the lower court's decree as a sufficient ground alone for refusing the writ. The *Carver* and *Powe* cases, *supra*—the other reported opinions in which the Supreme Court has spoken directly upon this subject—merely repeat the general proposition that denial of the writ imports no expression of opinion upon the merits of the case.

The question involved in the petition for certiorari to the Supreme Court in the *Loose-Wiles* case, *supra*, was upon a final judgment of the lower court, was narrowly defined and was identical with that now before us. In these circumstances, we feel it proper not only to give thoughtful consideration to denial of the writ in that case, but to

regard it as of some persuasive value in determination of the question here involved. See *United States* v. *Musselshell State Bank of Mussellshell, Mont., et al.*, 60 Fed. (2d) 157, 159; *Hornell Ice & Cold Storage Co.* v. *United States*, 32 Fed. (Sup.) 468, 471.

The fact that the decisions of the various district courts are in conflict, the fact that the Treasury Regulation provided for the collection of the tax in question, the fact that on two different occasions the Congress reenacted revenue provisions referring to this matter without questioning the accuracy of the Treasury Regulation, the decision of the Circuit Court of Appeals for the Second Circuit and the denial of the application for a writ of certiorari, and the fact that the collection of the tax places no undue burden on those who had previously purchased stocks of coconut oil, but leaves them on the same level with their competitors who had not purchased such stocks, taken together, leave us no choice but to follow the interpretation laid down in the *Loose-Wiles* decision.

It follows, therefore, that the plaintiff's petition must be dismissed, and it is so ordered.

MADDEN, *Judge;* WHITAKER, *Judge;* and WHALEY, *Chief Justice*, concur.

LITTLETON, *Judge*, dissents.

ROBERT H. RUSSELL AND STUART A. RUSSELL, EXECUTORS OF THE ESTATE OF HENRY L. RUSSELL, DECEASED, v. THE UNITED STATES

[No. 44189. Decided May 5, 1941]

On the Proofs

Estate tax; transfers made in contemplation of death.—Where it is shown that decedent during his entire life made relatively small gifts to his wife, and prior to a first stroke of paralysis, at the age of 66 years, made only small gifts to his sons and daughter; and where after a second stroke of paralysis decedent transferred approximately two-thirds of his property to his wife and children; it is *held* that plaintiffs, executors of decedent's estate, are not entitled to recover estate taxes assessed upon said estate after inclusion by the commissioner of the transfers so made, under section 302 of the Revenue Act of 1926.

Same.—Where decedent made no provision for his family with the exception of small amounts given to his sons and daughter previous to his sudden affliction, and then after a second stroke of paralysis disposed of a large portion of his estate by transfers to members of his family; it is *held* that the thought of death was the impelling motive for the transfers, thereby seeking to avoid testamentary dispositions.

Same; burden of proof on plaintiffs.—The burden was on plaintiffs seeking to recover estate taxes paid by them as executors to establish by preponderance of evidence that the decision of the Commissioner of Internal Revenue finding that transfers were made in contemplation of death was erroneous.

Same; motive for transfers.—In deciding whether gifts were made as substitutes for testamentary dispositions, and thus provided an evasion of the estate tax, motive which induced the transfers must be determined.

Same; substitute for testamentary dispositions.—Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of transferor; the dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *United States* v. *Wells*, 283 U. S. 102, 116, 117, 118, cited.

The Reporter's statement of the case:

Mr. George D. Brabson for the plaintiffs. *Mr. R. S. Doyle* and *Blair and Korner* were on the briefs.

Mr. Joseph H. Sheppard, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the briefs.

The court made special findings of fact as follows:

1. Plaintiffs are the duly qualified and acting executors of the estate of Henry L. Russell (hereinafter sometimes referred to as the "decedent"), of Holyoke, Massachusetts, who died March 5, 1935, at the age of 73 years. Plaintiffs are citizens of the United States and reside at Holyoke, Massachusetts.

The decedent left surviving him his wife, two sons, and one daughter.

2. February 21, 1936, plaintiffs filed an estate-tax return for the estate of decedent, which showed a gross estate of

$299,191.67, deductions of $115,034.88, a net estate of $184,156.79, and a tax due of $13,679.05, which was paid on the same day that the return was filed. The return also showed various transfers made by the decedent during his life to members of his family, which were not included as a part of the gross estate and which will be hereinafter referred to more specifically.

3. Upon review and audit of the estate-tax return the Commissioner of Internal Revenue proposed by letter of March 31, 1937, that decedent's gross estate be increased by including the value of certain property referred to in the return which the decedent had transferred to his wife and four children at various times from July 26, 1929, to March 24, 1931, which, with other adjustments not here in controversy, resulted in a gross estate of $874,847.29, deductions of $115,066.56, a net estate of $759,780.73, and a proposed additional tax of $102,034.20.

4. Upon further audit and reconsideration of that return the Commissioner on December 6, 1937, determined a gross estate of $803,866.29, a net estate of $638,799.73, and an additional tax of $86,418.38. The principal change from the letter of March 31, 1937, referred to in finding 3, insofar as transfers now in controversy are concerned, was the elimination from the gross estate of an item included as a part of that estate in the letter of March 31, 1937, representing the cancellation by the decedent on July 26, 1929, of unpaid balances on notes of decedent's three sons in the total amount of $42,150. The following transfers were included in the last determination:

	Returned	Value at which included by Commissioner in the gross estate
(a) The corpus of four trusts created by the decedent on October 14, 1929, each of which consisted of 100 shares of Fidelity Phoenix Fire Insurance Company stock	0	$12,450.00
(b) The value of 2,400 shares of J. Russell & Co. stock transferred by decedent to his three sons February 24, 1930	0	154,838.40
(c) The value of 500 shares of Henry L. Russell Realty Trust transferred by the decedent to his wife and four children on November 21, 1930	0	82,850.00
(d) The value of stocks and bonds transferred by the decedent to his wife March 24, 1931	0	252,658.25

In addition to the transfers set out above, which were included by the Commissioner in the decedent's gross estate, the following gifts or transfers without consideration had been made by the decedent to members of his family which were not included by the Commissioner as a part of the decedent's gross estate:

(a) Cancellation by the decedent in December 1924 of $25,000 from notes hereinafter referred to which the three sons had executed in favor of the decedent	$75, 000. 00
(b) Trust established by the decedent in October 1925 for his daughter	40, 000. 00
(c) Cancellation by the decedent on July 26, 1929, of unpaid balances on notes of his three sons	42, 150. 00

5. After receiving credit for State estate, inheritance, legacy, or succession taxes, plaintiffs on April 9, 1938, paid the deficiency referred to in the previous finding in the net amount of $73,594.51, together with interest of $8,143.78, that is a total of $81,738.29. The amount was paid pursuant to a waiver filed at the time of payment, waiving restrictions against the immediate assessment and collection of the deficiency. The payment was made under protest to stop the running of interest charges.

6. June 16, 1938, plaintiffs filed a claim for refund of $81,738.29, with interest, such amount being the entire amount of tax and interest paid, as shown in the preceding finding. The general basis of the claim was that the transfers of the property in question were made by the decedent as bona fide gifts to the members of his family consistent with a long series or course of gifts which the decedent commenced in January 1920; that they were not made in contemplation of death, and hence were improperly included by the Commissioner as a part of decedent's gross estate. June 29, 1938, the Commissioner rejected the claim for refund.

7. The decedent was a wholesale merchant engaged in the hardware and machinery business at Holyoke, Massachusetts. It was a family business which had been started by decedent's grandfather, Joel Russell, in 1865, when Joel Russell purchased a small tool store for the purpose of setting up in business his son, Robert Russell, Sr., decedent's father, who was a machinist.

8. Robert Russell, Sr., carried on the business for a number of years as a tool store, but he was essentially a machinist and did little or nothing to increase the business. Decedent went to work in his father's store as a young man. He was a very progressive type of man who believed in modernizing the business and had definite ideas for its development, especially along the lines of mechanical and electrical engineering. He foresaw the tremendous industrial development that took place in New England and had his sons trained in engineering courses at Worcester Polytechnic Institute and at Dartmouth College so that they would be qualified to go into that field.

Decedent was a practical businessman, active and enterprising. He was extremely industrious and conscientious and he expected the same sort of conduct from his family and everyone associated with him.

As a result of decedent's plans and efforts the small tool store started by his grandfather in 1865 was built up over some forty years until it became one of the largest wholesale hardware and machinery businesses in New England, being known as J. Russell & Co.

9. In developing the business of J. Russell & Co. decedent hoped that he could build up a business that would "hold the interest and activities of his three sons when they grew up." However, his desires in this regard were conditioned upon the sons being competent to run the business and their ability to get along with each other, as to which the decedent entertained some doubt.

In 1915 the decedent advised his son, Robert, that the worst thing he could do would be to work for him (decedent), and following that advice Robert went to work for the Western Electric Company, where he was employed for two years. The father was pleased with this arrangement but after two years he asked Robert to come to work for him because he needed help very much. After his return to work for his father, and prior to his joining the Army in 1917, Robert had many talks with his father in regard to the son's future connection with the business of J. Russell & Co.

10. By 1919 J. Russell & Co., stimulated by war orders and transactions, had grown enormously. The burdens and

problems of the business had also increased correspondingly because of the increased demands of war conditions. It was still a one-man business because decedent assumed responsibility for everything, including the making of every important decision, the buying, the selling, credits, and collections. Decedent had no real executive assistance in carrying on the business and was in need of assistants along that line upon whom he could rely. His eldest son, Newton, had been working in the business since 1908 but was not well suited for executive work. He did not like the routine or pace set by his father. Decedent's two younger sons, Robert and Stuart, had not yet returned from the World War.

11. In February 1919, before his two youngest sons returned from the World War, decedent's father, Robert Russell, Sr., died at the age of 88. He left a considerable fortune, all of which went to the decedent as the sole heir, and decedent was made administrator of the estate, which increased decedent's burdens as well as added to his personal fortune.

12. March 9, 1919, decedent wrote a letter to his son, Stuart, who was still in France, reading in part as follows:

> Stuart, the plan I have in mind is to have you go into the store with Newt and Rob. There ought to be room enough and I feel that I am at that age where I would like to feel able to go and come. You know that if you are in real business it means real business; that is, early and late. It isn't the boss who can be late for the help only imitate the boss, so you see I have a reason for shifting some of the responsibility to younger shoulders. The only thing is, will three brothers agree. They have in the past, but you can see if they didn't now, business would suffer and instead of good only bad would result.

13. Decedent's two youngest sons, Robert and Stuart, returned to Holyoke from France in the early part of 1919. Robert married in 1919 and shortly thereafter went on a hunting and fishing trip with his father, the decedent. On that trip decedent discussed with that son what his desires were for the business. Decedent told him that he hoped that his three sons would take hold of the business and be able to run it and get along with each other so that he could

turn the business over to them. Decedent also discussed his desires with his youngest son, Stuart, and told him that he wanted the sons to have the business and that he was going to give it to them but that he could not do this until he was assured that the sons would cooperate and go along together.

About the same time the decedent also discussed with his wife's sister his desires for taking his sons into the business but stated that he wanted to be assured first that they were fitted for the business and capable of handling it. He stated that he was going to have each of his sons give him a note for an interest in the business, that they were supposed to pay off the notes but he had no idea that they ever would.

In 1919 the decedent also discussed with his accountant his desire to take the boys into the business, but stated that he was reluctant to do so until they proved themselves worthy and capable of handling the business.

14. The store of J. Russell & Co. originally occupied a very small section of the first floor of a building owned by decedent, the rest of which was occupied by a hotel. In 1919 the store took over the entire building consisting of five floors. During this reconstruction operation it was necessary to clean out all rooms of the building, put in new concrete foundations and new floors, and install an elevator. All of this work was performed by decedent's sons and other employees without hiring any outside help. In doing this work they carried steel beams up to the roof, rearranged the stock, and performed other laborious tasks, working nights, Sundays, and holidays. Decedent was very much pleased with the manner in which his sons carried out this work with so little trouble on his part.

15. In January 1920, the decedent organized a partnership of the business of J. Russell & Co. and transferred to each of his sons a $\frac{3}{20}$-interest in the business and retained the balance of $\frac{11}{20}$. For the transfer of the interest to the sons, each of the sons gave to the decedent a note in the amount of $60,000, bearing interest at 6%. In fixing the amount of $60,000 for a $\frac{3}{20}$-interest in the business, there was no negotiating or bargaining between the sons and the father as to the amount to be paid by the sons but it was an amount fixed by the father and

accepted by the sons without question. Prior to that time the sons had been told by the father of his desire to take them into the business and the sons understood this giving of notes as a means on the part of their father of having them properly appreciate the value of an interest in the business as part owners and at the same time permitting the father to see whether the sons could cooperate and run the business.

The sons kept up the interest payments on the notes and also made payments on the principal. Some of the payments on the principal were made from the sons' distributive share of the profits. All payments made by the sons were accepted by the decedent and credited on the reverse side of the notes. Payments by the sons on the principal were not uniform.

16. The decedent's apprehensions as to his sons' ability to cooperate and get along together in the business were justified for a time, though, after some adjustments and readjustments with respect to their duties, the sons were able to work together in the business in a satisfactory manner.

17. In 1923 the partnership was incorporated and each son received $\frac{3}{20}$ of the stock (750 shares), which amounted to 2,250 shares, and the decedent received 2,750 shares. Decedent became president of the corporation, Robert, vice president, Newton, treasurer, and Stuart, secretary. Decedent remained president of the corporation until his death in 1935 and Newton remained treasurer until his death in 1934.

18. The decedent was extremely devoted to his wife and to his family. It was his practice to give each of his children substantial amounts upon the occasion of their marriage, and he made gifts to each of his children and grandchildren on their birthdays and at Christmas. In making these gifts he endeavored to treat his children substantially alike.

19. At Christmas, 1924, the decedent, as a Christmas gift to each of his sons, canceled $25,000 from the principal of the three $60,000 notes heretofore referred to. At that time the decedent told his sons that he was not giving his wife or his daughter, Laura, any part of the business because

he was afraid there would always be misunderstandings about the amounts to be paid to the sons as salaries and the amounts received by the wife and daughter as dividends, but that he was going to take care of them in another way and to make a gift to his daughter of other property to equalize the gifts to the sons.

20. In October 1925, the decedent established a trust for his daughter, Laura, of certain stocks and bonds having the value of $40,000. The income therefrom was paid to her until she reached the age of 35, at which time she received the principal. At the time the decedent created that trust he told his daughter that he had already made gifts to his three sons, that he was giving her an amount through this trust to equalize the gifts to her and to his sons, and that through the gift he desired to give her a measure of financial independence. The trust produced from $2,000 to $3,500 annually.

21. From time to time after his sons became active in the business the decedent expressed a desire to be relieved of some of his responsibilities, gradually to retire from business, and to travel. Prior to 1924 he had never taken an extended vacation, confining himself to short fishing trips and vacations of that kind. In 1924 he took his first extended vacation on a trip to Europe with his wife and daughter, when he was gone for one or two months. In 1926 decedent took his wife and daughter on an extended cruise to the Mediterranean and was away for about six weeks. He continued to go to the office in the same manner that he had prior to that time, but he spent more and more time on his personal investments, made suggestions as to how the business should be carried on and was content to oversee the results.

In 1927 he took his wife and her sister for a still longer vacation to South America, which lasted about three months. Upon his return decedent found himself still more out of touch with the business than he was after his return from the previous trip and he did not thereafter undertake to direct the affairs of the business, other than in the most general sort of way, leaving all of the details thereof to his sons. He was well pleased with the manner in which the

sons had carried on the business in his absence on these trips.

22. Prior to July 1, 1928, the decedent had enjoyed good health, and was a strong and vigorous man who had led an active life. About July 1, 1928, while he was preparing to go on a fishing trip, the decedent had a stroke of paralysis, resulting from a severe cerebral hemorrhage caused by the rupture of blood vessels, and was unconscious for several days.

23. The decedent was rendered completely unconscious for several days by the stroke and for a short time had to be fed rectally and to be given saline solutions with a hypodermic needle to supply moisture. In about a month he was able, with support, to stand and walk a little, and in approximately two to six months was able, with support, to go downstairs in his home. The effects of the stroke were mechanical, resulting in the paralysis of his right arm, right leg, and the loss of the power of speech. The other parts of his body were not affected. The decedent made steady and satisfactory progress toward recovery. His physicians were pleased with his progress and encouraged him in the belief that substantial recovery from the stroke was to be expected.

24. A registered nurse was the constant companion of the decedent from the time of his first stroke until his death and his physician made almost daily visits immediately after the stroke, and later less frequently, to watch over decedent's immediate physical condition, but more particularly, after the earlier visits, to guide and instruct him in recovering the use of the affected parts of his body, rather than because of any apprehension as to his physical condition. The number of visits by his physicians from the time the decedent was first stricken to the date of his death is shown below:

	Visits
Between July 1928 and January 1929	100
During the year 1929	178
" " " 1930	140
" " " 1931	47
" " " 1932	29
" " " 1933	22
" " " 1934	35
January 1935 to March 1935	22

25. After the decedent had made some progress in recovering from the first stroke, he had a second stroke on October 8, 1929, which rendered him unconscious for two or three hours and required that he be confined to his bed for about a week. His physicians, however, did not advise him that he had had a second stroke, but merely told him that he had been "a little ill and had to remain in bed a few days." Within a short time decedent substantially recovered from the second stroke without any serious effects on the progress which had been made on the recovery from the first stroke, except that his power of speech was more impaired.

About 1930 decedent developed a skin rash known as itchy dermatitis, which remained for one or two years, during which time it would respond to treatment and then recur. During that time ointments and X-ray treatments were applied to relieve itching.

26. He became able to walk with the support of the nurse and when supported in that way he could walk a hundred yards or more and go up and down steps, though he could bear little weight on his right leg. He learned to write with his left hand, and one of the duties of his nurse was to give him kindergarten lessons in reading, writing, and arithmetic. These lessons also had for their purpose improvement in speech. He regained the use of his arm and hand to the extent that he could raise his arm and bend it and close his fingers. He regained the use of his leg to the extent that he could move it in walking and raise the foot off the ground and bend the knee slightly. He never regained the use of his speech beyond the ability to make certain articulate sounds, but he could not form his words completely except to a very limited extent, such as saying "yes" and "no" and other short words.

The nurse not only assisted him in the exercises for the purpose of improving the use of the affected members of his body but also was in constant attendance to attend to his physical needs in washing and dressing him, assisting him in going to the bathroom where he could not go unassisted, and taking care of other matters of that kind. She slept on a cot in his room. A typical day's routine in the

life of the decedent after he had recovered sufficiently to be up and about the house was as follows: He arose at seven-thirty, after which the nurse helped him to dress, wash, and brush his teeth. He and his wife and the nurse then had breakfast in his room, after which the nurse massaged his arm and leg and gave him exercises. He and the nurse would then ride down to the store where they would remain for one or two hours, returning home for dinner at noon. After dinner he would sleep for an hour and a half and then take an automobile ride for one or two hours. After supper he would play pachisi or some other game with members of his family and his nurse until time to retire, at 9 p. m.

27. For five consecutive summers after 1928 decedent made an automobile trip from Holyoke to Cape Cod, requiring about six hours, where he visited his sister-in-law and enjoyed seeing the various places of interest. He also made two automobile trips to Atlantic City, one in 1929 and another in 1931. On all of these trips, as well as local automobile trips, he was always accompanied by his nurse. While he had practically retired from the business of J. Russell & Co. at the time of his first stroke, he continued thereafter to remain interested in what was being done, and on his visits to the store evidenced a keen interest in what was being done. He also continued his interest in local affairs, though he was unable to take any active part therein. He continued his substantial contributions to his church and to charitable organizations. In 1931 he gave $20,000 to a local hospital to endow beds in memory of his wife's parents which was the same amount he had given in 1927 to endow beds in memory of his parents.

28. In July 1929 decedent made a gift to each of his three sons of approximately $14,000 by canceling that amount from each of the $60,000 notes, heretofore referred to, such amount being the smallest amount which any one of the sons then owed on his note and resulting in the complete liquidation of Newton's note. There remained, however, approximately $12,000 and $7,000 due on the notes of Robert and Stuart, respectively, after the cancelation, and they borrowed these amounts from banks and paid off the notes in accordance with the express desire of the decedent.

29. October 14, 1929, the decedent established four trusts for the benefit of his daughter and his three daughters-in-law, each of the trusts comprising $3,112.50 in securities. The trusts were created largely on the suggestion of decedent's wife, who stated that she felt a married woman should be independent of her husband with respects to small amounts of money desired by her and should not be placed in the position of having to make requests when she desired money for small expenditures. While the trusts were created in October 1929, they were given to the beneficiaries as Christmas presents. The trust agreements, which were similar in terms, provided in part as follows:

> Donor reserves no power to revoke this trust, but he does reserve the right at any time, upon written notice by him delivered to the Trustee, to change the terms of this trust in any manner acceptable to the Trustee to take effect immediately and in the life of Donor, provided, however, that no such change shall be made that has the effect of restoring or transferring to the Donor any portion of the principal of the trust property. And the Donor also reserves to himself the right at any time in his discretion to demand in writing the resignation of the Trustee hereunder and to nominate his successor in the trust. And the Trustee agrees, upon such written demand, to release said trust, to transfer, convey, and deliver over the title and possession of the property thereof to its properly designated successor, and to account for its management and conduct of the trust within a reasonable time, not to exceed two months from the receipt of such demand.

30. In February 1930, decedent gave to each of his three sons 800 shares of stock in J. Russell & Co., which, when added to the amount previously held by them and acquired in the manner heretofore shown, gave each of them 1,550 shares, that is, all of the stock of the corporation except 350 shares, which the decedent retained until his death, and was then acquired by the corporation and is now held as treasury stock.

31. November 21, 1930, decedent created a trust known as the Henry L. Russell Realty Trust and conveyed to the trustees certain real estate for the benefit of his wife and four children. Each beneficiary received 100 shares in the

trust. The real estate had been looked after by the decedent's son, Robert, since the decedent's trip to South America in 1928, and his securities during the same time, by his son, Newton, but in both instances under the general supervision of the decedent and under power of attorney from decedent.

32. The decedent and his wife had started out in life with practically nothing. Over a period of forty years he had built up a large and prosperous business and a considerable personal fortune. He owed a large measure of his success and fortune to his wife, because of her frugality, interest, and general cooperation not only in the home but also in his business, and he often expressed to his sons and to others his gratitude for what she had done and his feeling as to how much of his success was due to her efforts and cooperation. They lived on a limited budget and during the earlier years had no domestic help. Until at least as late as the period when one of the younger sons was in high school, decedent and his wife had lived on $1,200 a year.

Decedent was a man of few words, having sound judgment and an astute mind. He was a stern disciplinarian and a power unto himself, usually offering no explanation for his actions. When his sons began working for him they each received $3.00 a week. Later they were advanced to $6.00, and later to $12.00 a week. In 1919, when they returned to the business after the war, each received a salary of $25.00 per week and their distributive share of the partnership profits, which amounted to about $2,000 per year.

33. On various occasions for a period of at least seven or eight years prior to 1931, the decedent had discussed the transfer of a substantial amount of property other than an interest in the business of J. Russell & Co., to his wife. He was opposed to having either his wife or daughter become stockholders in the corporation for reasons heretofore stated. For some time he had been impressed with the large amount of income tax he had to pay and had considered the effect on his income tax of conveying some of his property to his wife. He told his son, Robert, that some of the stocks and bonds which he held were not the

kind which he desired to transfer to his wife, as he was afraid she would not look after the property under changing business conditions. They were local industrial, nonlisted stock and he desired to make a conveyance in securities which would require less attention on her part. He stated he would change the stocks into bonds which would be more suitable for his wife to hold.

On March 24, 1931, after a list of securities had been prepared by his accountant in collaboration with one of his sons, and carefully considered by the decedent as to their character, the decedent transferred to his wife certain securities which had a value at the date of decedent's death of $252,658.25.

34. Except for the disabilities resulting from the strokes of paralysis heretofore referred to, decedent continued substantially in good health, both mentally and physically, until about February 1935, when a prostate condition developed, which was followed by an acute infection of the kidneys, from which he died some two or three weeks later.

35. The transfers referred to in Finding 4, as having been included by the Commissioner in the decedent's gross estate, constituted a material part of the decedent's gross estate, were made without adequate consideration in money or money's worth, and were made in contemplation of death.

The court decided that the plaintiffs were not entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

Henry L. Russell, a resident of Holyoke, Massachusetts, died on March 5, 1935, from an acute infection of the kidneys. The Commissioner of Internal Revenue assessed additional estate taxes upon the ground that certain transfers, prior to his death, were made in contemplation of death and should be included in the taxable estate under Section 302 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 70. The amount of the additional tax was paid by the executors and claim for refund was filed. The refund claim was rejected by the Commissioner and the executors brought this suit to recover the amount paid.

The decedent died at the age of seventy-three years, leaving surviving him his wife and three children, two sons and one daughter, his oldest son having died in 1934.

When a young man, Henry L. Russell and his father established a hardware and machinery business and through hard work and diligent efforts they built up the business to one of the largest hardware and machinery businesses in New England. Decedent had his sons trained in electrical courses at engineering colleges. He was extremely industrious and conscientious and expected the same sort of conduct in his family and everyone associated with him. Decedent's desire was to have his three sons enter the business which he had so strenuously built up and successfully established. One of the sons worked for his father and the other two sons went to war, returning from France in 1919 when they resumed work with their father. The business, stimulated by war transactions, grew enormously. The decedent expressed the desire, time and time again, to his sons to have them go into business with him, if they showed a capacity to manage it, as he wanted them to work together. After the sons had been working with him for a short time, in January 1920, the decedent organized a partnership of the business of J. Russell & Company and transferred to each of his sons a three-twentieths interest in the business and retained the balance of eleven-twentieths. Decedent required his sons to give him notes in the amount of $60,000 each, bearing interest at six percent. The amount of the notes was fixed by the father and there was no negotiating or bargaining between them. In 1923 the partnership was incorporated and each son received three-twentieths of the stock, or 750 shares, totalling 2,250 shares for the sons and the decedent received 2,750 shares. In 1924 decedent made to each of his sons a Christmas gift of $25,000 by way of canceling that amount from each of the three $60,000 notes which they had given to him. In October 1925 the decedent established a trust for his daughter of certain stocks and bonds having a value of $40,000. The daughter was not to receive the principal, but only the interest, until she reached the age of thirty-five years.

Decedent was a vigorous and strong man who had always led an active life. On July 1, 1928, he suffered a stroke of paralysis resulting from a cerebral hemorrhage and was unconscious for a week or more. After a month he was able to stand and walk a little with support, and in about two or more months he was able with support to go downstairs in his home. The effect of the stroke was the paralysis of the right arm, right leg, and the loss of the power of speech. A registered nurse remained with him, day and night, sleeping in his room and accompanying him wherever he went. Until his death, a registered nurse was always with the decedent.

After the decedent had made some small progress in recovering from the first stroke he had a second stroke on October 8, 1929, which rendered him unconscious for several hours and required that he be confined to his bed for a week. Decedent never regained the full use of his right arm or leg, nor his power of speech other than to make articulate sounds after months of coaching. In July 1929 the decedent cancelled $14,000 from each of the $60,000 notes heretofore referred to and required the sons to liquidate the balance on the notes and to pay the interest which remained due thereon.

After his second stroke in October 1929 the decedent established four trusts for his daughter and his three daughters-in-law, each trust consisting of securities in the value of $3,112.50. In February 1930, decedent gave to each of his three sons 800 shares of stock in J. Russell & Co. The result of these gifts was that each son had 1,550 shares of the capital stock of 5,000 shares, leaving only 350 shares to the decedent which he retained until his death. In November 1930 decedent created a realty trust known as the Henry L. Russell Realty Trust for the benefit of his wife and four children. In March 1931 he transferred to his wife certain securities valued at $252,658.25.

We have only to consider the transfers made by the decedent after the second stroke in October 1929. The Commissioner of Internal Revenue has not included in the decedent's gross estate the $14,000 which was given to each of the three sons and applied to their notes in July 1929, the Commissioner having found that only the transfers to the

daughter and the daughters-in-law, the transfers of 800 shares of stock to each of the sons, the realty trust to his wife and four children, and the transfer of securities to his wife were made in contemplation of death. The burden is on the plaintiffs to establish by the preponderance of evidence that the decision of the Commissioner of Internal Revenue is erroneous.

In our judgment, the plaintiffs have failed to overcome this presumption. It will be seen from the facts in this case that the decedent, during his entire life, made relatively small gifts to his wife, and, prior to his sudden and unexpected paralytic stroke in 1928, only small gifts to his sons and daughter, although he was a very rich man and had a very prosperous and successful business. These amounts given to his four children were small in comparison to what decedent possessed and allowed them only a small income for the support of themselves and their families. The evidence does not disclose that the decedent made any gifts of property or securities to his wife until after he had his second stroke. It is true that he desired, as every male parent does who has built up a successful business by hard work and diligence, to have his sons enter the business and to carry it on in future years. But, there is nothing to show that there was any well-considered or established plan on his part to divest himself of any interest in the business, prior to his stroke, whereby he was to part with the control of his business. When decedent died in 1935 he left a gross estate, excepting these gifts, of $299,191.67. If these gifts, above referred to, had not been excluded, the gross estate would have been $803,866.20. Therefore, decedent gave away approximately two-thirds of his property to his wife and children after he had suffered a second stroke of paralysis and when he had not been able to speak for a year and had not had the full use of his right arm and leg.

It is contended by the plaintiffs that decedent was of a bright, cheerful disposition; that his mind was clear; and that he did not believe he was going to die or that he was in a very serious condition. It is impossible to reconcile this view with the fact that, after his first stroke in July 1928 until the day of his death, decedent could not speak other

than make a few articulate sounds. There is nothing in the evidence to show that he ever wrote anything except his name to the documents transferring property. During all of this period while decedent was afflicted with lack of speech, lack of the use of his right arm and leg, and was dependent upon a trained nurse for support and attention constantly day and night, there is not a single line of evidence to show that he read a paper or magazine or had a paper or magazine read to him. Decedent may not have thought that death was imminent, but a man, with as keen a mind as his before he was stricken, must have known that he was in a serious condition and in a doubly serious condition after his second stroke.

The question before us is whether these gifts were made as substitutes for testamentary dispositions, and thus provide an evasion of the estate tax. We must determine the motive which induced the transfers.

As was said in the case of *United States* v. *Wells*, 283 U. S. 102, 116, 117, 118:

> * * * Transfers in contemplation of death are included within the same category, for the purpose of taxation, with transfers intended to take effect at or after the death of the transferor. The dominant purpose is to reach substitutes for testamentary dispositions and thus to prevent the evasion of the estate tax. *Nichols* v. *Coolidge*, 274 U. S. 531, 542; *Milliken* v. *United States*, ante, p. 15. As the transfer may otherwise have all the indicia of a valid gift *inter vivos*, the differentiating factor must be found in the transferor's motive. Death must be "contemplated," that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death.
>
> As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the ab-

sence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words "in contemplation of death" mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is "near at hand."

If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive. Such transfers were made the subject of a distinct gift tax, since repealed. * * * The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

When it is taken into consideration that the decedent made no provision for his family, with the exception of the small amounts given to his sons and daughter, and no provision for his wife, previous to his sudden affliction, and then, after his second stroke, disposed of over half of his entire estate, it is impossible to arrive at any other conclusion, taking his mental and physical condition into consideration, than that the thought of death was the impelling motive for the transfers, thereby avoiding testamentary dis-

positions. *Myers, Adm.*, 77 C. Cls. 429, certiorari denied, 292 U. S. 629; *Harris Trust et al.*, 90 C. Cls. 17, certiorari denied, 310 U. S. 632.

The determination of the Commissioner of Internal Revenue that the transfers to decedent's daughter and daughters-in-law, the transfers to his sons, the realty trust created for his wife and four children, and the transfer to his wife which constituted the material part of his estate, were made without adequate consideration of money or money's worth and were made in contemplation of death, we think, is correct.

The petition is dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* WHITAKER, *Judge;* and LITTLETON, *Judge*, concur.

ROLAND W. RETICKER, ADMINISTRATOR OF THE ESTATE OF H. B. RETICKER, DECEASED, v. THE UNITED STATES

[No. 44584. Decided May 5, 1941]

On the Proofs

Estate tax; properly conveyed under trust indenture; reservation of control of distribution.—Decided upon the authority of *Porter et al.* v. *Commissioner*, 288 U. S. 436, and *Hoblitzelle et al., Executors* v. *United States*, 77 C. Cls. 639, in which it was *held* that under similar provisions in the trust instrument the property conveyed thereby was properly included in the gross estate.

The Reporter's statement of the case:

Mr. L. A. Luce for the plaintiff.

Mrs. Elizabeth B. Davis, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The court made special findings of fact as follows, pursuant to a stipulation of the parties:

1. The plaintiff, a citizen of the United States and a resident of the City of Los Angeles, California, is the administrator of the estate of H. B. Reticker, deceased.

2. H. B. Reticker died in Los Angeles, California, on November 6, 1932. On May 24, 1930, the decedent, H. B. Reticker, created a trust known as "Trust No. P-8963." The Title Insurance and Trust Company, a California corporation, was designated as trustee thereof.

Among other things the trust instrument provided as follows:

Section Nine

> IT IS EXPRESSLY UNDERSTOOD that this Trust No. P-8963 IS IRREVOCABLE as to corpus and as to "net income."
>
> However, the right hereby is reserved unto the aforesaid H. B. Reticker (the Trustor) TO AMEND this Trust in whole or in part at any time or from time to time by written request therefor addressed and delivered to the Trustee: *Provided*, The Trustor cannot so amend this Trust as to make him a beneficiary in any manner hereunder.

3. After the death of H. B. Reticker, plaintiff duly filed an estate tax return for the estate of the decedent. In this return the value of the property transferred in the trust above described was not included in the gross estate. The Commissioner of Internal Revenue thereafter determined a deficiency in estate tax in the amount of $11,236.11 which arose from the inclusion in gross estate of the value of the property so transferred in trust. The amount of $11,236.11 was paid on February 9, 1935, and interest of $849.64 was paid on May 23, 1935, making a total of $12,085.75.

On February 8, 1937, a claim for refund of estate tax was filed upon the ground that the value of the property transferred in trust was not subject to the estate tax under the estate tax provisions of the Revenue Acts of 1926 and 1932. This claim for refund was rejected by the Commissioner of Internal Revenue on June 7, 1937.

4. There is no dispute between the parties as to the value of the property transferred in trust, and the parties agree that the only question is whether it should be included in the gross estate of the decedent under the provisions of section 302 (d) of the Revenue Act of 1926.

The court decided that the plaintiff was not entitled to recover.

Green, *Judge*, delivered the opinion of the court:

The plaintiff, the administrator of the estate of H. B. Reticker, deceased, brings this suit alleging that the Commissioner of Internal Revenue wrongfully included in the gross estate the value of certain property conveyed by the decedent in trust, by reason whereof the plaintiff was required to pay a deficiency in the estate tax in the amount of $11,236.11, and interest thereon in the sum of $849.64. A claim for refund was duly filed in proper form and disallowed.

The question of whether the value of this property was properly included in the gross estate arises under the provisions of the trust instrument, which are as follows:

> It is expressly understood that this Trust No. P–8963 is irrevocable as to corpus and as to "net income."
>
> However, the right hereby is reserved unto the aforesaid H. B. Reticker (the Trustor) to amend this Trust in whole or in part at any time or from time to time by written request therefor addressed and delivered to the Trustee: *Provided*, The Trustor cannot so amend this Trust as to make him a beneficiary in any manner hereunder.

It will be observed that under these provisions the trustor reserved the right to amend the trust in whole or in part. The language used, we think, gave the trustor power to change the beneficiaries' enjoyment of the property, either entirely or partially, and this conclusion is strengthened by the reservation in the earlier part of the instrument that no beneficiary could sell or alienate his interest in any way. The trustor could not change the trust so as to get back to himself either the corpus of his trust or the net income, but he could change the interests of the beneficiaries.

Section 302 of the Revenue Act of 1926, provides:

> Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (d) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject

at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke. * * *. (44 Stat. 9, 70.)

We think the case is controlled by the decisions in *Porter et al.* v. *Commissioner*, 288 U. S. 436, and *Hoblitzelle et al., Executors* v. *United States*, 77 C. Cls. 639, where, under similar provisions in the trust instrument, the property conveyed thereby was held properly included in the gross estate. We do not think it is necessary to repeat the reasons given for these decisions as set out in the opinions rendered.

The petition of the plaintiff must be dismissed, and it is so ordered.

WHITAKER, *Judge*, LITTLETON, *Judge*; and WHALEY, *Chief Justice*, concur.

THE RAYMOND COMMERCE CORPORATION v. THE UNITED STATES

[No. 45037. Decided May 5, 1941]

On the Proofs

Rental of property by Government; consensual contract.—Where the Government occupied as lessee premises belonging to plaintiff, and where before the expiration of the lease on June 30, 1934, defendant on February 19, 1934, initiated negotiations for further occupancy of said premises for an additional 6-month period, and thereafter at defendant's option on a monthly basis until April 30, 1935, and that it should, if it left the premises before April 30, 1935, give 30 days' notice; and where the lease was extended in accordance with these negotiations; and where defendant continued to occupy the premises after the expiration of the extended lease on April 30, 1935, and until March 31, 1936, paying the rent as before; and where defendant without notice vacated the premises on March 31, 1936; it is *held* that the defendant was liable as on a consensual contract and the plaintiff is entitled to recover.

Same; jurisdiction.—The defendant's obligation after April 30, 1935, was the same as before and was contractual within the meaning of the act (U. S. Code, title 28, sec. 250) conferring jurisdiction upon the Court of Claims.

Same; continued occupancy.—Where one person occupies the property of another for a period under an express agreement as to the terms of his occupancy, and after the end of the period such person continues to occupy without any indication that he contemplates a change in terms, and where the other accepts rent, thus consenting to continued occupancy, without indicating that he contemplates a change; it is *held* that their continued relation is consensual.

Same.—The fact that legal doctrines relating to landlords and tenants would, or might, impose the same legal obligations upon them if they acted as they did, even though they expressed an unwillingness to become so obligated, does not keep their transaction from being treated, for any material purpose, as consensual if it is consensual in fact. *Goodyear Tire & Rubber Co.* v. *United States* (No. F-20, 62 C. Cls. 270; 276 U. S. 287; 66 C. Cls. 764) distinguished.

The Reporter's statement of the case:

Mr. Roland Aubrey Bogley for plaintiff. *McKenney, Flannery & Craighill* were on the briefs.

Mr. R. E. Mitchell, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. Elihu Schott* was on the brief.

The court made special findings of fact as follows:

1. Plaintiff, The Raymond Commerce Corporation, is a corporation organized under the laws of the state of New Jersey, with its principal office and place of business in Newark, N. J.

2. For a period prior to July 1, 1934, the defendant occupied, under a lease from plaintiff, about 6,700 square feet of floor space in the Lefcourt Newark Building in Newark, N. J., for use as offices and court rooms of the United States District Court.

3. In February 1934 the defendant's agent and plaintiff began negotiations for a new lease of the premises, pending the completion of the new Federal Building in Newark. In a letter of February 19, 1934, the defendant asked for a renewal of the existing lease on a month-to-month basis, with the understanding that the defendant would give thirty days' notice of intention to vacate. Plaintiff refused to consider a month-to-month tenancy and asked for a definite lease to April 30, 1935, at a reduced monthly rental.

4. March 26, 1934, the defendant's agent replied to plaintiff's proposal, stating that the new Federal Building would not be ready for occupancy until December 1934, possibly later, and suggesting a six months' lease, running to December 31, 1934, with the option of renewing it from month to month until the new building was ready, with a provision that the lessor would be given thirty days' notice of intention to vacate.

5. Plaintiff replied to that proposal in a letter dated April 2, 1934, reading in part as follows:

> We will consider a renewal of the lease for six (6) months at the rate of $18,000.00 per annum, with the privilege of allowing the tenant to remain monthly thereafter up to and including April 30, 1935. During the period from January 1, 1935, to April 30, 1935, when the tenancy is on a monthly basis, they should give us thirty (30) days' prior notice when they desire to terminate such monthly tenancy.

6. April 7, 1934, defendant's agent sent plaintiff the following letter:

> * * * We are sending through a request for authority to renew the lease on the basis suggested in your letter and will send the necessary lease forms for your signature at an early date.

7. May 28, 1934, plaintiff entered into a lease of the premises with defendant for a term beginning July 1, 1934, and ending December 31, 1934, at a stipulated rental of $1500.00 per month. The lease was written on the defendant's standard lease form.

8. Paragraph 5 of the lease read as follows:

> 5. This lease may, at the option of the Government, be renewed at a monthly rental of $1,500 from month to month until such time as the new Federal building is ready for occupancy, and otherwise upon the terms and conditions herein specified, provided notice be given in writing to the Lessor at least   months before this lease would expire: Provided that no renewal thereof shall extend the period of occupancy of the premises beyond the 30th day of April, 1935.

No notice of the exercise of defendant's option to renew was given to plaintiff by defendant, but defendant continued to

occupy the premises and to pay the monthly rental therefor until the premises were vacated as hereinafter set forth.

9. Defendant continuously occupied the premises from July 1, 1934, to and including the 31st day of March 1936, and paid to plaintiff rental in the amount of $1,500.00 per month throughout the period from July 1, 1934, to December 31, 1934, as well as throughout the period from January 1, 1935, to and including March 31, 1936.

10. There were no communications between the parties concerning the time when the defendant would actually vacate the premises until defendant first notified plaintiff of its intention to vacate, by letter addressed to plaintiff under date of March 31, 1936, by William P. McDermitt, United States Marshal.

11. The new Federal Building was ready for occupancy March 28, 1936, and the representatives of the defendant occupying space in the Lefcourt Newark Building vacated the premises and moved into the Federal Building on March 30 and March 31, 1936.

12. On March 31, 1936, plaintiff rendered its bill to the defendant in the amount of $1,500.00 for rent of the premises for the month of April 1936. Claim was formally presented to the defendant in a letter to the Department of Justice, dated August 11, 1936. The claim was declined on behalf of the defendant by the Department of Justice, by a letter addressed to plaintiff's counsel, enclosing a copy of a letter to the United States Marshal from the office of the Attorney General, advising him to decline to make any adjustment in the matter of plaintiff's claim and closing as follows:

> The claim is a highly technical one and if it is to be pursued it must be determined by a court of proper jurisdiction.

13. Plaintiff has not been paid any part of the rent of $1,500.00 for the month of April 1936.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

The defendant, being in occupation as lessee of plaintiff's premises in Newark, N. J., as quarters for its United States

District Judges and other officers and attendants of the District Court, became aware that the new Federal Building in Newark would not be completed for occupancy by June 30, 1934, on which date its lease expired. On February 19, 1934, the defendant's agent initiated a correspondence with plaintiff looking toward the retention of the quarters until the Federal Building should be completed. Plaintiff's letter of April 2, quoted in finding 5, and defendant's reply of April 7, quoted in finding 6, show the intention of the parties. It was that the defendant should be bound to pay the rent for six months, i. e., to December 31, 1934; that thereafter it could remain, at its option, on a monthly basis, until April 30, 1935, and that it should, if it left the premises before April 30, 1935, give thirty days' notice in order to escape paying further rent. Since both parties contemplated that the occasion for the defendant's leaving the premises would be the completion of the new Federal Building, they intended that the thirty days' notice should be given when that completion should make it possible for the defendant to move. It would, of course, have been permissible for the defendant to vacate during the January to April period on thirty days' notice for any reason, but the one reason was the only one that the parties really thought of. Both intended that the occupancy should terminate not later than April 30, 1935.

The lease was then drawn on the defendant's standard lease form and it contained, after the definite six months term to December 31, 1934, the paragraph, which is quoted in finding 8, relating to the right to renew the lease. The statement that the lease was renewable "from month to month" by the defendant must have, in the circumstances, meant that the notice incident to a tenancy from month to month was contemplated. The language is susceptible of that meaning, *Hanks* v. *Workmaster*, 75 N. J. L. 73; *Decker* v. *Hartshorne*, 65 N. J. L. 87, and if it does not receive it, an important term of the lease, suggested first by the defendant, later requested by plaintiff, and agreed to by the defendant just before the lease was executed, was inexplicably aban-

doned. We have no doubt that, if the Federal Building had been completed, for example, in February, 1935, the defendant could not have escaped paying rent to plaintiff except by giving thirty days' notice.

April 30, 1935, the date of the termination of the lease, passed, and the defendant did not move then, nor until March 31, 1936. It paid the rent as before, which was received without comment. On March 31, 1936, the defendant moved from the premises without giving notice in advance. Plaintiff, claiming that it was entitled to thirty days' notice, sues for the rent for the month of April 1936.

The defendant urges that its remaining in the premises after April 30, 1935, and paying rent which was received by plaintiff without comment extended the previous lease, under which the defendant urges it was not obliged to give any notice. Plaintiff contends that, under the previous lease, it was entitled to notice and was similarly entitled under an extension of the lease. Plaintiff further contends that, whether or not it was entitled to notice under the previous lease, the defendant became a hold-over tenant after April 30, 1935, and as such was obliged to give a month's notice before it could escape liability for rent. The defendant's reply to the latter contention is that, conceding that a private tenant holding over would be so obligated, the obligation is one imposed by law rather than by contract, hence the defendant, in the statute prescribing the jurisdiction of this court, U. S. Code, Tit. 28, sec. 250, has not consented to be sued upon it.

We agree with the defendant that its obligation after April 30, 1935, was the same as before. However, as we have indicated above, we think that its obligation before that date was to give thirty days' notice. We also think that the defendant's obligation after April 30 was contractual within the meaning of our jurisdictional act. If one person occupies the property of another for a period under an express agreement as to the terms of his occupancy, and, after the end of the period he continues to occupy without any indication that he contemplates a change in terms, and

if the other accepts rent, thus consenting to continued occupancy, and without indicating that he contemplates a change in terms, their continued relation is consensual. They have, as plainly as if they had put it into words, shown their mutual willingness to continue the existing arrangement. The fact that legal doctrines relating to landlords and tenants would, or might, impose the same legal obligations upon them if they acted as they did, even though they expressed an unwillingness to become so obligated, does not keep their transaction from being treated, for any material purpose, as consensual if it is consensual in fact. It is not an unusual situation in the law for the legal consequences of two similar courses of conduct to be the same, for most purposes, though in one case both parties intended the consequences, and in the other, one of the parties hoped to escape these and all other legal consequences. The familiar procedure of waiving the tort and suing in assumpsit is in point. But the fact that if there were a tort, it could be waived, and a suit in the nature of a contract action could be brought, does not require the court to treat the situation as if there were a tort when there is none, or as if there were no contract, when there is one.

The question of whether a hold-over tenant, under other circumstances, could be sued in this court becomes, then, immaterial, and a case such as that of *Goodyear Tire & Rubber Co.* v. *United States*, 276 U. S. 287 (62 C. Cls. 270; 66 C. Cls. 764), where the defendant at the beginning of the hold-over period expressly repudiated the obligation which the plaintiff there contended it had become subject to, is not in point.

We conclude that plaintiff is entitled to recover $1,500. It is so ordered.

JONES, *Judge;* WHITAKER, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

SWIFT AND COMPANY v. THE UNITED STATES

[No. 45324. Decided May 5, 1941]

On Defendant's Motion to Dismiss

Processing taxes paid by exporter who was also processor; determination of Commissioner final.—Where an exporter who was also the processor brings suit in the Court of Claims to recover processing taxes levied under the Agricultural Adjustment Act on goods subsequently exported; it is *held* that the court is without jurisdiction to review the determination of the Commissioner of Internal Revenue denying such refund, under the provisions of section 601 (e) of the Revenue Act of 1936.

Same; power of Congress to deny review.—Courts are loath to ascribe to Congress an intention to clothe an administrative officer with uncontrolled authority to adjudicate a claim, without judicial review, but there is no doubt of the power of Congress to do so.

Same; jurisdiction.—Where Congress expressly provided for review of the Commissioner's determinations on questions of law involving a claim for refund filed by a processor under title VII, section 906 (b); and where Congress in section 601 (e), Title IV, expressly denied to all courts jurisdiction to review the Commissioner's determination on a claim by an exporter, or by one claiming a refund of floor stock taxes, without making any exception to this denial of jurisdiction; it is *held* that Congress intended to deny jurisdiction in such cases to the courts for all purposes.

Mr. W. Parker Jones for the plaintiff. *Mr. James W. Jones* was on the brief.

Mr. Hubert L. Will, with whom was *Mr. Assistant Attorney General Samuel O. Clark, Jr.*, for the defendant. *Messrs. Robert N. Anderson* and *Fred K. Dyar* were on the brief.

The facts sufficiently appear from the opinion of the court.

WHITAKER, *Judge*, delivered the opinion of the court:

This is a suit by an exporter who was also the processor to recover processing taxes on goods subsequently exported. It comes before us on defendant's motion to dismiss on the ground that this court is without jurisdiction.

In *Wilson & Company* v. *United States*, 90 C. Cls. 131 (311 U. S. 104), we held that an exporter was entitled to a draw-

back of the processing taxes paid, although it was also the processor; but that, under the facts of that case, its sole remedy was before the Commissioner of Internal Revenue, and that this court did not have jurisdiction to review the Commissioner's determination. This was because of the provisions of section 601 (e) of Title IV of the Act of June 22, 1936 (49 Stat. 1648, 1740), which reads:

> The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination.

The Supreme Court agreed with us that we did not have jurisdiction.

That case and this case, however, are distinguishable in this: In the *Wilson* case it did not appear for what reason the Commissioner had disallowed the claim, whereas in this case it appears it was because he construed the Revenue Act of 1936 to deny the draw-back to an exporter who was also the processor. The plaintiff says that Congress did not intend by section 601 (e) to deprive the courts of jurisdiction to review questions of law. It says the Commissioner's determination is final only as to questions of fact, and that even as to such questions it is subject to review by the courts if arbitrary or capricious, or supported by no evidence. This is the issue presented.

In the *Wilson* case the Supreme Court did not pass on this issue; nor did we. The Supreme Court said:

> Petitioners contend that Congress intended to commit to the final determination of the Commissioner only "such matters as findings of fact, computations, and the like." Quite apart from the fact that in sec. 601 (d) Congress uses virtually the quoted words in limiting review by administrative officers, we fail to see how the argument can aid petitioners here because the record does not show why their claims were denied. Since the record is silent on this point, such decisions as *United States* v. *Williams*, 278 U. S. 255, and *Silberschein* v. *United States*, 266 U. S. 221, are plainly distinguishable.

Except for section 601 (e), it is clear that this court would have jurisdiction to determine the plaintiff's right to recover, because that right is "founded upon a law of Congress," to

wit, section 17 (a) of the Agricultural Adjustment Act, as amended, (48 Stat. 31). Sec. 145 of Judicial Code; *United States* v. *Laughlin*, 249 U. S. 440; *Dismuke* v. *United States*, 297 U. S. 167, 169. Nor will this section be construed to deprive the courts of jurisdiction unless the evidence of such an intention on the part of Congress is inescapable.

In *United States* v. *Laughlin*, *supra*, suit was brought under section 2 of the act of March 26, 1908 (35 Stat. 48), for an alleged excess payment for public lands. This section reads:

> That in all cases *where it shall appear to the satisfaction of the Secretary of the Interior* that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives. [Italics ours.]

The Government contended that under this section the decision of whether or not there had been paid an amount in excess of the lawfully required amount was committed to the exclusive jurisdiction of the Secretary of the Interior. This contention was rejected by the court. It said:

> * * * In our view it was the intent of Congress that the Secretary should have exclusive jurisdiction only to determine disputed questions of fact, and that, as in other administrative matters, his decision upon questions of law should be reviewable by the courts. In the case before us the facts were not and are not in dispute and were shown to the Secretary's satisfaction; whether, as matter of law, they made a case of excess payment, entitling claimant to repayment under the Act of 1908, was a matter properly within the jurisdiction of the Court of Claims. See *Medbury* v. *United States*, 173 U. S. 492, 497–498; *McLean* v. *United States*, 226 U. S. 374, 378; *United States* v. *Hvoslef*, 237 U. S. 1, 10.

The case of *United States* v. *Williams*, 278 U. S. 255, involved the right of the court to review the action of the Director of the Veterans' Bureau on a claimant's rights under an adjusted-compensation certificate. The court quoted the provisions of section 310 of the Act which made the decisions of the administrative officers "final and conclusive," but it intimated that if they were wholly dependent on a

question of law, they might be reviewed by the courts. It said:

> * * * The record does not disclose the basis for his action; but whatever it may have been, his decision is final, at least unless it be wholly without evidential support or wholly dependent upon a question of law or clearly arbitrary or capricious. *Silberschein* v. *United States*, 266 U. S. 221, 225, and cases there cited.

In *Dismuke* v. *United States*, 297 U. S. 167, the court had under consideration the question of whether or not the decision of the Commissioner of Pensions on an employee's rights under the Retirement Act was subject to review by the courts. The court recognized that the United States was not bound to provide a remedy in the courts for enforcement of claims against it and that it might afford a claimant only an administrative remedy; "but," it said,

> in the absence of compelling language, resort to the courts to assert a right which the statute creates will be deemed to be curtailed only so far as authority to decide is given to the administrative officer. If the statutory benefit is to be allowed only in his discretion, the courts will not substitute their discretion for his. *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551; *United States* v. *Atchison, T. & S. F. Ry. Co.*, 249 U. S. 451, 454; *Ness* v. *Fisher*, 223 U. S. 683. If he is authorized to determine questions of fact his decision must be accepted unless he exceeds his authority by making a determination which is arbitrary or capricious or unsupported by evidence, see *Silberschein* v. *United States*, 266 U. S. 221, 225; *United States* v. *Williams*, 278 U. S. 255, 257, 258; *Meadows* v. *United States*, 281 U. S. 271, 274; *Degge* v. *Hitchcock*, 229 U. S. 162, 171; or by failing to follow a procedure which satisfies elementary standards of fairness and reasonableness essential to the due conduct of the proceeding which Congress has authorized. *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 330, 331. But the power of the administrative officer will not, in the absence of a plain command, be deemed to extend to the denial of a right which the statute creates, and to which the claimant, upon facts found or admitted by the administrative officer, is entitled. *United States* v. *Laughlin*, 249 U. S. 440, 443; *United States* v. *Hvoslef*, *supra*; *McLean* v. *United States*, *supra*, 378; *Parish* v. *MacVeagh*, 214 U. S. 124; *Medbury* v. *United States*,

> *supra*, 497, 498; see *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, 109, 110.
>
> The Commissioner is required by sec. 13, "upon receipt of satisfactory evidence" of the character specified, "to adjudicate the claim." This does not authorize denial of a claim if the undisputed facts establish its validity as a matter of law, or preclude the courts from ascertaining whether the conceded facts do so establish it. * * * The administrative decision thus turned upon a question of law, whether a field deputy marshal during the period from December 16, 1895, to December 30, 1902, was an employee of the United States. The administrative determination of that question is open to review in the present suit, and should have been considered and decided by the court below.

The Commissioner of Internal Revenue in the case now before us has denied the refund because he was of opinion that as a matter of law an exporter who was also a processor was not entitled to the refund under Title IV of the Revenue Act of 1936, but we held in *Wilson & Company* v. *United States*, 90 C. Cls. 131, that an exporter was entitled to the refund under this title, notwithstanding the fact that he was also the processor. Therefore, to paraphrase the Supreme Court's language, the Commissioner has denied to the plaintiff a right which in our opinion the statute creates, and to which the plaintiff upon the facts set out in its petition is entitled. The Supreme Court says that it will not be deemed that the administrative officer had such power, "in the absence of a plain command." Is that "plain command" found in section 601 (e) of the Revenue Act of 1936?

This section does not say in so many words that no court shall have jurisdiction to review his determination, whether that determination be on a question of law or not. On the other hand, the finality of his determination is not limited to findings of fact. In the preceding subsection, sec. 601 (d), dealing with review of his decisions by administrative or accounting officers, Congress expressly said that the Commissioner's determination should not be reviewed by them, whether those determinations were of facts, were mathematical calculations, or were on the merits. In dealing with review by the courts, Congress was not so explicit, but it did say, "no court shall have jurisdiction to review such deter-

mination," and no exception was made to this denial of jurisdiction.

Courts are loath, as the Supreme Court said in the *Dismuke* case, to ascribe to Congress an intention to clothe an administrative officer with uncontrolled authority to adjudicate a claim, even to the point of denying a claimant a right against the Government given to him by law. Such power is not given even to the courts; their decisions are always subject to review. But there can be no doubt of Congress' power to do so. It need not afford a claimant any remedy, except his constitutional right to petition Congress for redress of his grievances. *A fortiori*, it can confine his remedy to the forum of an administrative tribunal or officer.

We have come reluctantly to the conclusion that this was Congress' intention in the enactment of this Act. The report of the House Committee on this bill sets out its justification of "the withdrawal of any right to judicial review of the determinations of the Commissioner." It reads:

> Section 601 (e) makes the determination of the Commissioner of Internal Revenue with respect to any refund under this section final and not subject to judicial review, and section 601 (f) disallows any claim for interest with respect to claims for refund made under this section. It is the opinion of your committee that, while provision for the relief of claimants in the cases covered by this section should be made, the fact that the refunds will be made to persons other than those who paid or were liable for payment of the tax under the Agricultural Adjustment Act, as amended, and the present doubt as to the legal status of these claims warrants the disallowance of interest and the withdrawal of any right to judicial review of the determinations of the Commissioner.

With reference to an identical provision relating to the floor stocks tax, section 602 (i), the Committee said:

> Section 602 (i) makes the determination of the Commissioner with respect to any payment under this section final and not subject to judicial review. Section 602 (j) denies any allowance of interest in connection with payments made under this section. Since the section is purely remedial and provides a form of relief which, however justifiable as a matter of equity and sound policy, is not required by law, your committee is of the

opinion that both provisions are warranted by considerations of administrative convenience and economy and the prevention of unnecessary litigation.

Moreover, Congress expressly provided for judicial review under Title VII, where the processor sought to recover processing taxes. By section 906 (b) under this title there was created a Board of Review clothed with jurisdiction to review the allowance or disallowance by the Commissioner of a claim for refund. The Board was required to make findings of fact and to act upon the claim. A review of its decisions by the Circuit Courts of Appeal was provided for. Such courts were given authority to affirm, modify, or reverse its decision, "if it is not in accordance with law." Under well known rules of the Circuit Courts of Appeal the Board's findings of fact are conclusive, if there is any substantial evidence to support them.

Having expressly provided for review of the Commissioner's determinations on questions of law involved in a claim for refund filed by a processor under Title VII, and having expressly denied to all courts jurisdiction to review his determinations on a claim by an exporter, or by one claiming a refund of floor stock taxes, without making any exception to this denial of jurisdiction, it must be concluded Congress meant to deny jurisdiction to the courts for all purposes.

We are, accordingly, forced to the conclusion that we have no jurisdiction to review the Commissioner's determination.

The petition must be dismissed. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.



CASES DECIDED

IN

THE COURT OF CLAIMS

March 3, 1941, to June 1, 1941.

INCLUSIVE, UNDER THE ACT OF JUNE 25, 1938, TO RECOVER INCREASED COSTS IN CONNECTION WITH GOVERNMENT CONTRACTS RESULTING FROM THE ENACTMENT OF THE NATIONAL INDUSTRIAL RECOVERY ACT *

GRAYS FERRY BRICK CO. (INC.) v. THE UNITED STATES

[No. 44005. Decided March 3, 1941. Defendant's motion for new trial overruled June 2, 1941.]

On the Proofs

Extra labor costs under National Industrial Recovery Act.—Under the provisions of the Act of June 25, 1938, it is *held* that plaintiff is entitled to recover for the increase in labor costs in manufacturing brick for use on Government contract for the construction of the Philadelphia post office, such increase in labor costs under the National Industrial Recovery Act to be based on the plaintiff's average labor costs for a period of 6 months from January to June, 1933.

Same; loss of possible profit not recoverable.—The Act of June 25, 1938, does not authorize recovery for a loss of possible profit on material manufactured prior to enactment of the National Industrial Recovery Act, which material might otherwise have been disposed of. *Pollock* v. *United States*, 91 C. Cls. 257 cited.

Same; additional employees; inefficiency of extra labor.—Where in order to comply with the provisions of the National Industrial Recovery Act it was necessary for plaintiff, in supplying material on a Government contract, to employ an extra foreman; and where it was necessary also for plaintiff in order to comply with said act to employ an extra shift, entailing increased costs by reason of the inefficiency of new and inexperienced labor so employed, it is *held* that plaintiff is entitled to recover.

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*See vol. 92, pp. xxiii–xxix.

The Reporter's statement of the case:

Mr. Prentice E. Edrington for the plaintiff.

Mr. Edward L. Metzler, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Mr. J. H. Reddy* was on the brief.

Plaintiff instituted this suit under the act of June 25, 1938, which conferred upon this court jurisdiction to hear, determine, and enter judgment upon claims of government contractors whose costs of performance were increased as a result of the National Industrial Recovery Act of June 16, 1933; and section 1 thereof authorized the court to consider and render judgment upon claims of materialmen who furnished materials to a subcontractor engaged by a prime contractor.

The court, having made the foregoing introductory statement, entered special findings of fact as follows:

1. Plaintiff, a Pennsylvania corporation with principal office and place of business at Philadelphia, is and was at all times hereinafter mentioned engaged in the manufacture of sand lime brick. August 31, 1932, defendant entered into a contract with Starrett Brothers & Ekin, Inc., under which that company agreed to furnish all labor and material necessary to construct a post office building in Philadelphia. On October 5, 1932, John B. Kelly, Inc., entered into a contract with the prime contractor to furnish and erect all brick and hollow tile work in the building to be constructed for the defendant. December 8, 1932, John B. Kelly, Inc., the subcontractor, made an agreement with plaintiff ordering 2,500,000 sand lime bricks at an agreed price of $9.50 a thousand to be delivered, as needed and called for, to Kelly for use in the construction of the Federal Post Office Building. This order was accepted by plaintiff in order to help keep its plants running, thus saving possible losses from inaction, although little or no profit was expected to be derived by plaintiff from the contract with Kelly. The bricks were manufactured and delivered as and when demanded or called for by Kelly. Plaintiff's contract with that company was completed in February 1934.

2. The National Industrial Recovery Act was approved June 16, 1933, 48 Stat. 195, and, on July 28 of that year, plaintiff signed the President's Reemployment Agreement pursuant to that act. At the time this agreement was signed plaintiff's plant was not being operated and it had no men on its pay roll. The National Industrial Recovery Act Code of Fair Competition applicable to the business engaged in by plaintiff did not become effective until after plaintiff's contract with Kelly had been completed. During the performance of its contract with Kelly, plaintiff manufactured and delivered 1,768,656 bricks, of which number 374,750 were manufactured by plaintiff prior to May 1933 and prior to the time it signed the President's Reemployment Agreement; the remainder, 1,393,906 bricks, was called for, manufactured, and delivered after plaintiff signed the Reemployment Agreement. Plaintiff complied in every way with the provisions of such agreement. Prior to the signing of the Reemployment Agreement, plaintiff's direct labor cost for the manufacture of bricks for the six-months' period from January to June 1933, inclusive, was $1.7694 a thousand, based on 406,000 bricks manufactured during operation of the plant in the months of January, March, and April 1933. The average direct labor cost for a period of one year prior to July 1, 1933, was $2.35 a thousand bricks. The 427,000 bricks manufactured in the last six months of 1932 were produced to fill such orders as had been received from time to time during that period, and plaintiff operated its plant during that period only two or three days in each month. The operation by plaintiff of its plant for the six-months' period, January to June 1933, inclusive, was more comparable to the operation of its plant in the manufacture and furnishing of materials for use on the government contract for the period July 28, 1933, to the completion of the contract in February 1934, after the signing of the President's Reemployment Agreement, than was the operation of the plant over a one-year period prior to the signing of this agreement, which period included the last six months of 1932. Plaintiff's direct labor cost for manufacturing brick during the fall of 1933 and the winter of 1933–1934, after it signed

the President's Reemployment Agreement, was $3.12 a thousand.

3. The increased direct labor cost of $1.3580 over the prior cost of $1.7694 a thousand bricks for the six-months' period prior to the signing by plaintiff of the President's Reemployment Agreement, when applied to 1,393,906 bricks manufactured at the increased rate, amounts to $1,892.92. If the prior cost per thousand bricks is averaged over a period of one year prior to July 1, 1933, the increased direct labor cost subsequent to signing of the Reemployment Agreement is $0.7734 a thousand, instead of $1.3580, which, when applied to the 1,393,906 bricks manufactured at such increased rate of $0.7734 amounts to $1,078.05. Plaintiff's direct labor cost for manufacturing and delivering brick for use in the Philadelphia Post Office, after the signing and compliance with the President's Reemployment Agreement, is admitted to be $3.1274 a thousand.

During the period April 18 to April 29, 1933, plaintiff manufactured 193,000 bricks which were delivered for use in the Post Office Building, and the direct labor cost for manufacturing these bricks was $1.76 a thousand. Plaintiff's daily production report shows no delay or manufacturing difficulties during manufacture of these brick.

4. According to plaintiff's daily production report it experienced some delay in manufacturing brick in January and February 1934 due to the freezing of materials and temporary breakdown of machinery. Plaintiff's daily production reports for the months of October, November, and December 1934 are not available, but the delays caused by frozen materials and breakdown are not shown to have increased plaintiff's costs due to the custom in the industry of laying off employees at such times. If there were any added costs attributable to delays they are included in the direct labor average cost of $3.12 a thousand bricks manufactured from October 1933 to completion of the contract in February 1934. These same winter costs are also included in the cost of manufacturing bricks in the months of January to March 1933, inclusive, prior to signing of the Reemployment Agreement. This item of plaintiff's claim is based upon the increased cost of direct labor and no claim is made

for broken bricks or overhead. During the months of May to September 1933, inclusive, John B. Kelly, Inc., made no calls on plaintiff for delivery of bricks and no bricks were manufactured during this period, during which plaintiff's plant was closed. The manufacture of sand lime brick is more economical during the summer season than during the winter season due to freezing of sand and other materials.

5. From and after the signing of the President's Reemployment Agreement plaintiff reduced its total weekly hours of work from 70, and in rush periods of 84 hours a week, to the maximum required by such Reemployment Agreement, but found it was unable to fulfill the requirements of the contract for delivery of brick for use in the Philadelphia Post Office Building and was compelled to operate a double shift for five weeks or more during the fall of 1933 after the signing of the Reemployment Agreement in order to produce brick in quantities sufficient to meet the demands and calls of the subcontractor, John B. Kelly, Inc. During such period it was also necessary to, and plaintiff did, employ an extra foreman at a wage resulting in an increased cost of $262.57. Plaintiff was required to, and did, engage a night shift which required the training and breaking in of additional new men. It could not locally secure additional trained personnel required to provide the additional night shift; however, it did secure from other brick plants certain trained brick laborers, but they were unaccustomed to the operation of plaintiff's machines and it was necessary for them to go through a certain period of training in order to familiarize themselves with the operation of plaintiff's plant. In addition to the increase in wages of its workmen, plaintiff suffered increased costs due to losses in efficiency of the new laborers and certain damage to machinery due to such inefficiency and inexperience of the new employees. Because of curtailment in hours of work under the National Industrial Recovery Act and the President's Reemployment Agreement, it was necessary for plaintiff to employ 25 additional men in furnishing bricks for use on the Philadelphia Post Office, and at least twenty of these men were inexperienced and had to go through a period of training. The

increased cost to plaintiff for this reason and on that account was at least $285.

6. The extra cost of manufacturing and storing brick for future deliveries is $1.00 a thousand. Limited storage space at plaintiff's yard made it impracticable to anticipate orders and manufacture in advance the quantity of brick required under its contract with Kelly for the brick necessary in the construction of the Philadelphia Post Office. The efficient method of handling bricks is to move them from the hardening cylinder to the railroad yard or truck; double handling by storing and subsequent loading is expensive and is not customary in the trade.

7. December 14, 1934, plaintiff filed a claim for $2,517.05 with the Department under which the prime contract for the construction of the Philadelphia Post Office was made, which claim was for the asserted increased cost to plaintiff incurred by reason of its compliance with the President's Reemployment Agreement. The claim was never allowed in any amount and plaintiff has received nothing from the Department on account thereof.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

In this case plaintiff seeks to recover $2,441.59 as reimbursement for certain increased costs incurred by it by reason of its compliance with the provisions of the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195, and the President's Reemployment Agreement thereunder in furnishing material for use in constructing a Post Office Building in Philadelphia. The suit is brought under the act of June 25, 1938, chap. 699, 52 Stat. 1197, which conferred upon this court jurisdiction to hear, determine, and enter judgments against the United States upon claims of the contractors, including completing sureties and all subcontractors and materialmen performing work or furnishing material to the contractor or another subcontractor, whose contracts were entered into on or before August 10, 1933, "for increased costs incurred as a result of the enactment of the National Industrial Recovery Act." The act further provided that it should not be interpreted as raising any presumption or conclusion of fact or

law but should be held solely to provide for trial upon the facts as may be alleged, but that judgments under the act "shall be allowed upon a fair and equitable basis."

Both parties have made and submitted full and complete audits of plaintiff's operations prior and subsequent to the enactment of the Recovery Act and the signing of the President's Reemployment Agreement, and there is no dispute between the parties as to the accuracy of the figures in either audit but the parties disagree, first, as to the period of operations prior to the signing of the Reemployment Agreement to be used in determining manufacturing costs to be deducted from such costs incurred subsequent to the signing of such agreement; second, as to the number of bricks supplied for use on the Government contract to which the increased cost a thousand bricks after the signing of the Reemployment Agreement should be applied; and, third, the amount of that portion of plaintiff's claim resulting in increased costs through loss of efficiency by reason of the necessity of having to employ new and untrained men in operating the plant in fulfillment of the contract for furnishing materials for use in construction of the Post Office Building at Philadelphia in conformity with restrictions and requirements of the Reemployment Agreement.

December 8, 1932, and prior to the enactment of the National Industrial Recovery Act plaintiff entered into an agreement with John B. Kelly, Inc., brick mason subcontractor for the Philadelphia Post Office Building, for future delivery to Kelly of approximately 2,500,000 sand lime bricks as required and called for by Kelly in connection with the subcontract construction work. The evidence shows, without dispute, that plaintiff accepted the order of Kelly and agreed to furnish the necessary number of bricks for $9.50 a thousand in order to help keep its plant running, thus saving losses from inaction of the plant, although plaintiff expected to derive little or no profit from the contract at that price. During the year 1932 plaintiff's brick plant was operated only to the extent necessary to fill such orders as it received and during the last six months of 1932 the plant was operated only two or three days a month. Plaintiff did not have sufficient open area at its plant to store a large quantity of

brick and, in addition to this, it was the custom of the trade, and more economical, to ship bricks directly from the brick-making machines to railroad cars or trucks, which practice resulted in a saving of $1 a thousand in handling charges. In April 1933 the Kelly Company gave plaintiff a call under its contract for production of bricks and in a continuous operation for approximately ten days plaintiff produced 193,000 bricks which, added to other bricks on hand, were delivered. No further calls for bricks were made by Kelly until October 1933. In the meantime, the National Industrial Recovery Act was approved June 16, 1933, and thereafter, on July 28, 1933, plaintiff signed the President's Reemployment Agreement pursuant to the Recovery Act. In October 1933 Kelly made calls on plaintiff for continuous delivery of brick and in compliance with the President's Reemployment Agreement the plaintiff, whose plant had been idle since the end of April 1933, shortened its weekly hours of work, increased the pay of its employees, and fully complied with all the terms and provisions of the Reemployment Agreement. After October 1, 1933, plaintiff manufactured and delivered, for use in the construction of the Philadelphia Post Office, 1,575,656 bricks, of which 1,393,906 were actually manufactured under the terms and conditions of the Recovery Act and the Reemployment Agreement. The difference of 181,750 brick delivered after October 1, 1933, came out of plaintiff's inventory of the stock on hand at the time plaintiff signed the Reemployment Agreement on July 28, 1933, which bricks had been manufactured prior to that date.

Both parties agree that plaintiff's direct labor cost in manufacturing and furnishing bricks in the construction of the Philadelphia Post Office was $3.1274 a thousand after the enactment of the Recovery Act and the signing of the Reemployment Agreement; and while the parties are not in disagreement as to the direct labor cost for manufacturing bricks prior to signing of the Reemployment Agreement, they are not in accord as to the period prior to the signing of such agreement which should be used for the purpose of determining the average direct labor cost per thousand to be applied to the costs subsequent to the date on which plaintiff

signed and thereafter complied with the Reemployment Agreement for the purpose of determining the increased direct labor cost for which plaintiff, under the act of June 25, 1938, is entitled to reimbursement. The defendant has used a 12 months' period, July 1932 to June 1933, inclusive, and, by so doing, has arrived at a prior direct labor cost of $2.35 a thousand bricks manufactured, which price is arrived at by averaging the direct labor cost over such one-year period. This gives a subsequent N. R. A. increased cost of $0.7734. Plaintiff has used, for the purpose of determining the prior direct labor costs, the six months' period January to June 1933, inclusive, which it insists should be used because it is more nearly comparable to the operations incident to furnishing the material in question after the signing of the Reemployment Agreement, and arrives at a prior direct labor cost of $1.7694. This gives a subsequent N. R. A. increased cost of $1.3580. The direct labor cost in manufacturing such bricks as plaintiff did manufacture during the last six months of 1932 was $2.9050 a thousand. Upon the evidence and circumstances disclosed by the record, we think plaintiff is correct and that the prior average direct labor cost of $1.7694 over a period of six months from January to June 1933, inclusive, is fair and equitable and more nearly comparable to the subsequent operations of plaintiff in fulfilling its contract and that this average direct labor cost should be used in determining the amount of subsequent increased cost for which the act of June 25, 1938, authorizes reimbursement to plaintiff. On this basis plaintiff's increased direct labor cost after the signing of the Reemployment Agreement was $1.3580 a thousand bricks and, when applied to 1,393,906 bricks thereafter manufactured at the increased rate, amounts to $1,892.92, for which judgment will be entered. Plaintiff had operated under its contract with the John B. Kelly Company in manufacturing and furnishing bricks for use in the Philadelphia Post Office Building for about six months prior to the signing of the Reemployment Agreement and thereafter operated in the fulfillment of such contract for about six months, or until February 1934. The operating conditions and costs during these two periods, except for the changed conditions brought about by the

enactment of the Recovery Act and the signing of the President's Reemployment Agreement, were, as the record discloses, the same.

The next item in plaintiff's claim relates to the number of bricks to which the subsequent National Industrial Recovery Act increased cost of $1.358 a thousand should be applied. The plaintiff contends that this increased direct labor cost should be applied to the cost of manufacturing 1,575,656 bricks instead of 1,393,906, or a difference of 181,750 bricks, for the reason that the last-mentioned number of bricks was manufactured for the Philadelphia Post Office prior to enactment of the National Industrial Recovery Act and was subsequently delivered; and that it should be permitted to replenish its inventory, and include costs of so doing as a part of its increased cost after the signing of the Reemployment Agreement. We think this item of the claim cannot be allowed under the provisions of the act of June 25, 1938. The bricks were not manufactured and delivered under conditions imposed by the Recovery Act and the Reemployment Agreement, and the act of June 25, 1938, does not authorize the entry of judgment for loss of a possible profit on material previously manufactured which might otherwise have been disposed of. Cf. *David Pollock, et al.* v. *United States*, 91 C. Cls. 257. Moreover, it is clear that if plaintiff had manufactured all the brick necessary to the fulfillment of its contract with the John B. Kelly Company prior to enactment of the National Industrial Recovery Act and the signing of the President's Reemployment Agreement no basis would exist for entry of judgment in favor of plaintiff merely because such brick was delivered after enactment of the Recovery Act and the signing of the Reemployment Agreement. This item of plaintiff's claim in the amount of $246.82 is therefore denied.

The next item of plaintiff's claim is for $547.57, made up of $262.57, wages paid to an extra foreman after the signing of the Reemployment Agreement, and made necessary by reason of compliance therewith, and $285, increased cost due to and resulting from decreased efficiency in operations due to the necessity of having to employ an extra shift of new and inexperienced laborers in order to comply with the Reem-

ployment Agreement in the fulfillment of the contract to furnish the material necessary for construction of the Federal Post Office Building at Philadelphia. The evidence of record establishes the correctness of these amounts and we think that under the provisions of the act of June 25, 1938, they are allowable in the circumstances disclosed. These increased costs directly resulted from the reduction in the weekly hours of work from 70, and in rush periods of 84 hours a week, to the minimum required by the Reemployment Agreement which reduction in hours compelled plaintiff, in order to fulfill the requirements of its contract for the delivery of material for use in the Philadelphia Post Office Building, to employ an extra foreman and engage an additional night shift of employees, and this required the training and breaking in of about twenty-five additional new men.

Upon the facts disclosed, and for the reasons stated, plaintiff is entitled to recover $2,441.59, and judgment will be entered in its favor for that amount. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

No. 44347. MARCH 3, 1941

The David Hummel Building Co., *(A Corporation)*.

The court made special findings of fact substantially as follows:

Plaintiff, an Ohio corporation, on April 17, 1933, entered into a subcontract with the Great Lakes Construction Company, as general contractor, to furnish all limestone required by the prime contract for use in the construction of the Federal Narcotic Farm, at Lexington, Ky., which contract was completed by the general contractor and final settlement authorized by the Treasury Department.

On August 17, 1933, when plaintiff had supplied 34.7% of the total stone under its subcontract, it signed and entered into an agreement with the President of the United States known as the President's Reemployment Agreement duly

authorized by the National Industrial Recovery Act approved June 16, 1933, 48 Stat. 195. Under this agreement plaintiff, from and after August 17, 1933, increased the pay of its employees, reduced the total weekly hours of work in its plant, increased the pay of its truck drivers, paid assessments to the Code Authority for the Limestone Industry, and paid compensation and public liability insurance on the increased wages in the fabrication and delivery of the cut stone called for by its subcontract with Great Lakes Construction Company.

Plaintiff paid out in increased costs from and after August 17, 1933, up to May 11, 1934, on which date it completed its said subcontract, on account of increased direct labor costs in its plant for the production and fabrication of the cut limestone delivered between August 17, 1933, and May 11, 1934, the sum of $2,670.90; paid increased wages to its truck drivers in the delivery of said materials the sum of $673.00; paid the sum of $31.20 for compensation insurance on said increased pay rolls; and paid to the Code Authority in assessments the sum of $242.42, or a total sum of $3,617.52. All these increased costs resulted from compliance by plaintiff with the agreement referred to above.

The court decided that the plaintiff was entitled to recover.

LITTLETON, *Judge*, delivered the opinion of the court:

The plaintiff, as a subcontractor for the Great Lakes Construction Company, the prime contractor engaged by the defendant to construct the Federal Narcotic Farm at Lexington, Kentucky, had completed 34.7% of its work on August 17, 1933, on which date it signed the President's Reemployment Agreement as authorized by the National Industrial Recovery Act of June 16, 1933, 48 Stat. 195. Plaintiff complied with this agreement and in so complying it incurred excess and increased costs as set forth in the findings in the amount of $3,617.52 in the execution of its subcontract from and after August 17, 1933, in furnishing the cut limestone specified and called for by the prime contract between the defendant and the Great Lakes Construction Company.

Plaintiff duly filed a claim with the Department concerned pursuant to the act approved June 16, 1933, within the period

specified in that act but received no settlement on its claim. The total of the increased costs set forth in finding 6 directly resulted from compliance by plaintiff with the National Industrial Recovery Act and the President's Reemployment Agreement authorized by such act. The plaintiff is therefore entitled to recover the amount of such increased costs and judgment will be entered in its favor for $3,617.52. It is so ordered.

GREEN, *Judge;* and WHALEY, *Chief Justice,* concur.

WHITAKER, *Judge,* took no part in the decision of this case.

No. 44072. APRIL 7, 1941.

Electric Boat Company, A Corporation.

The court made special findings of fact substantially as follows, upon the stipulation of the parties:

On June 29, 1931, plaintiff entered into an agreement, being Contract NOD–311, with defendant through its representative, C. F. Adams, Secretary of the Navy, for the construction of a fleet submarine (cruiser type) not to exceed 1,150 tons standard displacement, later known as the U. S. S. *Cuttlefish.*

Pursuant to the National Industrial Recovery Act a code of fair competition known as the "Code of Fair Competition for the Shipbuilding and Shiprepairing Industry" (hereinafter referred to as the Shipbuilding Code) was approved by the President of the United States on July 26, 1933, and, as amended, was thereafter enforced as a law of the United States until declared unconstitutional by the Supreme Court on May 27, 1935.

The plaintiff became a party to the Shipbuilding Code on August 5, 1933, and in accordance with the provisions thereof commenced on August 6, 1933, to operate its plants and yards, including its yard at Groton, Connecticut, where the U. S. S. *Cuttlefish* was being constructed, and continued to so operate its plants and yards until the National Industrial Recovery Act and the Shipbuilding Code, promulgated pursuant thereto, were declared unconstitutional.

After August 5, 1933, in accordance with said code, plaintiff reduced the normal work week of its plant from 40 to 32 hours, using three shifts working six days per week. The number of men directly employed on the U. S. S. *Cuttlefish* was increased thereby approximately 35%.

It was also found by the court that the increased costs as a result of compliance with the said code, between August 6, 1933, and October 27, 1934, when the U. S. S. *Cuttlefish* was substantially completed, was $45,358.23 for direct labor and for compensation and liability insurance, and $5,799.25 for supervision and other items, which are set forth in the findings, totaling $51,157.58.

Owing also to the reduction in hours, an extension of 77 calendar days was granted by the Secretary of the Navy for the completion of the contract.

The court decided that the plaintiff was entitled to recover.

WHALEY, *Chief Justice*, delivered the opinion of the court:

The facts in this case have been stipulated and disclose that the Secretary of the Navy, upon the completion of the contract, made a finding of fact that the plaintiff had been delayed by reason of its compliance with the Shipbuilder's Code and, in addition, had incurred increased costs by reason of the reduction of hours, the employment of additional employees, and the establishment of a shift system in carrying out the provisions of the National Industrial Recovery Act, June 16, 1933, 48 U. S. 195.

The items sought to be recovered are not in dispute and are included within the terms of the act of June 16, 1934 (U. S. C., Title 41, § 28–33, as amended by the Act of June 25, 1938, 52 Stat. 1197).

The plaintiff is entitled to recover the sum of $51,157.58. It is so ordered.

MADDEN, *Judge;* JONES, *Judge;* and LITTLETON, *Judge*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

No. 44273. APRIL 7, 1941.

Anchor Coal Company, A Corporation.

The court made special findings of fact substantially as follows:

Plaintiff, a Missouri corporation, engaged in the retail coal business with its principal place of business in St. Louis, Mo., on May 26, 1933, submitted a bid to supply 400 tons of two-inch bituminous lump coal at $2.50 per ton to the United States Appraisers Stores, Treasury Department, St. Louis, during the fiscal year beginning July 1, 1933, which bid was duly accepted, subject to revision in accordance with the National Industrial Recovery Act of June 16, 1933.

On July 27, 1933, plaintiff signed the President's Reemployment Agreement under said act. On September 18, 1933, a Code of Fair Competition for the Bituminous Coal Industry was approved by the President and became effective October 2, 1933.

Plaintiff's bid price of $2.50 per ton was predicated on an agreement with W. L. Miller, a salesman for the Eldnar Coal Mine at Belleville, Illinois, to furnish the coal at the mine at $1.15 per ton subject to the National Industrial Recovery Act, on an agreement with a trucker that the drayage from the mine to the building would be 80¢ per ton and on a current agreement with laborers under which plaintiff was paying them storage or wheeling-in charges at the rate of 20¢ per ton. The balance of 35¢ per ton was to be for overhead and profit.

During the months of August and September 1933 plaintiff received the coal for this contract from the Eldnar Coal Mine at $1.15 per ton. For the rest of the coal for this contract plaintiff was required to pay $1.95 per ton, which was the price fixed under the Bituminous Coal Industry Code.

The Code of Fair Competition for the Retail Solid Fuel Industry provided that employees engaged in storing coal on a tonnage basis should be paid not less than the 1929 tonnage rate, which was 50¢ per ton. Before this code went into effect plaintiff paid for storing the coal 20¢ per ton, and afterwards 50¢ per ton.

The cost of delivering the coal from the mine to the building, for which the plaintiff had a contract at 80¢ per ton, was increased during the fall of 1933 to $1.00 per ton, effective October 1, 1933, in accordance with a proposed code for the trucking industry; which code, however, was never approved by the President and never became effective.

In accordance with the contract, plaintiff delivered to the defendant 395.335 tons of coal and was paid therefor the bid price of $2.50 per ton, making a total of $988.34.

It was found by the court that for the reasons and in the circumstances set forth in the findings the plaintiff, in the performance of its contract, incurred increased costs to deliver the coal to the defendant at the United States Appraisers Stores in St. Louis, Missouri, to wit: 80¢ per ton on 130 tons of coal at the mine on and after October 11, 1933; 20¢ per ton for the hauling of 357.22 tons of coal from the mine to the building on and after October 11, 1933; and 30¢ per ton for the storage of 156 tons of coal on and after March 1, 1934, as follows:

Hauling 130 tons at 20¢ per ton	$26.00
Storing or wheeling-in 156 tons at 30¢ per ton	46.80
Cost of coal at mine, 357.22 tons at 80¢ per ton	285.78
Total	358.58

The court decided that the plaintiff was entitled to recover the sum of $253.67, as follows:

Hauling 130 tons at 20¢ per ton	$26.00
Storing or wheeling-in 156 tons at 20¢	31.20
Increased cost at mine, 357.22 tons, 55¢	196.47
Total	253.67

JONES, *Judge*, delivered the opinion of the court:

The Anchor Coal Co. instituted this suit to recover the increased costs to which it claims it was subjected in complying with a contract to deliver coal to an agency of the Government during the fiscal year beginning July 1, 1933.

These increased costs were alleged to be the direct result of the National Industrial Recovery Act, which was approved June 16, 1933. (48 Stat. 195.)

The action was brought pursuant to an Act of Congress, approved June 25, 1938, 52 Stat. 1197, conferring jurisdiction on the Court of Claims to hear, determine and enter judgment against the United States upon the claims of contractors who performed work or furnished material on contracts entered into on or before August 10, 1933, and whose costs were increased as a result of the enactment of the National Industrial Recovery Act.

Section 3 of the jurisdictional act is as follows:

> Judgments or decrees, if any, under this Act, shall be allowed upon a fair and equitable basis, and notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res adjudicata, laches, or any provisions of Public Act Numbered 369, as enacted on June 16, 1934.

The contract was entered into prior to August 10, 1933, and provided for the delivery of 400 tons of coal during the then current fiscal year at $2.50 per ton.

The proof shows that the plaintiff actually incurred increased costs of $404.02 above the prices that prevailed at the time of entering into the contract.

The evidence is conflicting, but supplemented by the exhibits establishes the facts set out in the Commissioner's report.

The bid price of $2.50 per ton was based on an agreement with W. L. Miller, salesman for the Eldnar Coal Company of Belleville, Illinois, to furnish the coal at the mine for $1.15 per ton, an agreement with a trucker for drayage to the building at 80¢ per ton and an agreement with laborers that the storage or wheeling-in charge would be 20¢ per ton, the remaining 35¢ being allowed for overhead and profit.

After October 1, plaintiff was required to pay $1.95 per ton for coal at the mine, which was the price fixed by the Bituminous Coal Industry Code.

Of this increase of 80¢ per ton the proof shows that 25¢ per ton was attributable to the seasonal and usual change in prices following the summer months.

The increase of 55¢ per ton was the result of the enactment of the National Industrial Recovery Act and it is fair and

equitable that plaintiff should recover this amount on the coal delivered on the contract after October 1, 1933.

The Code for the Retail Solid Fuel Industry provided that employees engaged in connection with the storing of coal should be paid not less than the 1929 tonnage rates, which were 50¢. While plaintiff at the time the contract was entered into was paying only 20¢ per ton for wheeling-in charges, that was shown to be the lowest price that prevailed at any time, and even so, usually applicable only to large contracts. Plaintiff had no reasonable right to expect such low wages to remain through a year's period.

An allowance of 20¢ per ton to cover the increased cost of storage or wheeling-in charges due to the National Industrial Recovery Act is fair and equitable under the facts of this case.

The plaintiff had a contract with a trucking company to do hauling at 80¢ per ton. This company hauled approximately 130 tons after October 11, 1933, at $1.00 per ton. The evidence shows that this increase was due to the enactment of the National Industrial Recovery Act.

As to the remaining part of the coal that was delivered after October 11, 1933, the evidence is so indefinite as to who employed those who did the hauling, and as to how much and by whom they were paid, as to be wholly unsatisfactory. It is insufficient as a basis for any affirmative finding.

Plaintiff is entitled to recover $253.67.

It is so ordered.

LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

MADDEN, *Judge*, dissenting in part.

I do not think that the circumstances set forth in the findings of fact with reference to the cost of trucking the coal bring the increase in the cost of trucking within the 1938 act, as increases occurring, in a legal sense, "as a result of the enactment of the National Industrial Recovery Act." I would therefore eliminate from the judgment any allowance for such an increase.

WHITAKER, *Judge*, took no part in the decision of this case.

No. 44343. APRIL 7, 1941

William G. Heiner and C. Lawrence Evans, Trustees of National Radiator Corporation.

The court made special findings of fact in part as follows, upon a stipulation of the parties:

1. The National Radiator Corporation is a corporation organized under the laws of the State of Maryland, and is engaged in the manufacture of heating equipment with its plant and principal office at Johnstown, Pennsylvania.

2. William G. Heiner and C. Lawrence Evans are the duly appointed and qualified trustees of the National Radiator Corporation * * *.

3. On February 6, 1933, the defendant entered into a contract with John McShain, of Philadelphia, Pennsylvania, as general contractor, for the construction, in accordance with drawings and specifications, for the defendant as owner, of a federal building at Philadelphia, Pennsylvania, known as the United States Naval Hospital and related Buildings, said contract being Contract No. NOy-1717.

4. On March 30, 1933, the general contractor, John McShain, entered into a subcontract with Daniel J. Keating, Inc., of Philadelphia, Pennsylvania, for the furnishing and installation by the subcontractor of all plumbing and heating work called for and required by the prime contract.

5. On April 21, 1933, the National Radiator Corporation entered into a subcontract with Daniel J. Keating, Inc., under which it agreed for a fixed price for future delivery when required to furnish radiators for 56,000 feet of radiation required by the prime contract in the construction of the Naval hospital and related buildings.

6. Before any of the radiators could be produced under the agreement of April 21, 1933, with Daniel J. Keating, Inc., the National Industrial Recovery Act was enacted and approved on June 16, 1933, and pursuant to the terms of said Act, the plaintiff entered into an agreement with the President known as the "President's Reemployment Agreement" authorized by Section 4a of said Act. On February 3, 1934, the plaintiff became bound by the Code of Fair Competition for the Cast Iron Boiler and Cast Iron Radiator Industry,

duly approved by the President under the authority of the act of June 16, 1933.

7. The plaintiff complied with and adhered to the agreement with the President and applicable code of fair competition in the manufacture and production of its products. In so complying, the plaintiff shortened its total weekly hours of work in its plants, and made increases and adjustments of the pay of its employees, which resulted in its incurring increased and added costs in the manufacture and production of the radiators.

8. As a result of the operation of the plaintiff's plants pursuant to the provisions of the President's reemployment agreement and code of fair competition as above set forth, plaintiff's direct labor costs on the radiators manufactured after August 25, 1933, and delivered to Daniel Keating, Inc., for use in the Naval hospital and related buildings, was the sum of $670.22 over and above what it would have been otherwise, all incurred as a result of the enactment of the National Industrial Recovery Act, approved June 16, 1933, and the promulgation of the President's Reemployment Agreement and applicable code pursuant thereto. The above amount does not include increased salaries of officials or employees in executive or managerial positions earning $35.00 per week or more. Plaintiff complied with the memorandum and order as to procedure in submitting proof of increased costs issued by the Court on February 1, 1939.

* * * * *

The court decided that the plaintiff was entitled to recover the sum of $670.22.

No. 44364. APRIL 7, 1941

Hanley Company, A Corporation.

The court made special findings of fact in part as follows, upon a stipulation of the parties:

1. Plaintiff is a Pennsylvania corporation having its principal office at Bradford, Pennsylvania, and is engaged in the manufacture of brick and structural clay units. The brick

manufactured by the plaintiff company, excepting variations as to grades, was a standard product.

2. On February 6, 1933, the defendant entered into a contract with John McShain, of Philadelphia, Pennsylvania, as general contractor, for the construction, in accordance with drawings and specifications, for the defendant as owner, of a federal building at Philadelphia, Pennsylvania, known as the United States Naval Hospital and related Buildings, said contract being Contract No. NOy-1717.

3. On February 24, 1933, the general contractor, John McShain, entered into a subcontract with John B. Kelly, Inc., of Philadelphia, Pennsylvania, for the performance by the subcontractor of the brick work required by the prime contract.

4. On or about April 6, 1933, plaintiff accepted written order No. B711-4 of the subcontractor, John B. Kelly, Inc., for future delivery at a fixed price per thousand bricks for various grades named in the order for approximately 2,356,000 bricks required and called for by the prime and subcontracts. Plaintiff fulfilled the above order by manufacturing and delivering the bricks required in the construction of the United States Naval Hospital and related buildings.

5. Before plaintiff could manufacture and deliver the bricks required by John B. Kelly, Inc., under the order of April 6, 1933, the National Industrial Recovery Act was enacted and approved on June 16, 1933, and pursuant to the terms of said Act plaintiff, on July 29, 1933, entered into an agreement with the President known as the "President's Reemployment Agreement" authorized by Section 4a of said Act. On December 7, 1933, plaintiff became bound by the Code of Fair Competition for the Structural Clay Products Industry, as amended May 1, 1934, and November 5, 1934, duly approved by the President under the authority of the act of June 16, 1933.

6. On and after August 1, 1933, plaintiff complied with and adhered to the agreement with the President and applicable code of fair competition in the manufacture and production of its products. Plaintiff shortened the total weekly hours of employment of its employees, increased the pay of its employees to the minimum required by the agreement and

code, made certain adjustments with those employees whose pay was in excess of the minimum scale of wages set by the agreement and code so that their total weekly pay would not be less under the shortened weekly hours than they had received prior thereto.

7. As a result of the operation of the plaintiff's plant pursuant to the provisions of the President's reemployment agreement and code of fair competition as above set forth, plaintiff's direct labor costs on the materials manufactured by the plaintiff after August 1, 1933, and delivered to John B. Kelly, Inc., for use in the construction of the United States Naval Hospital and related buildings, was the sum of $1,120.56 over and above what it would have been otherwise, all incurred as a result of the enactment of the National Industrial Recovery Act, approved June 16, 1933, and the promulgation of the President's reemployment agreement and applicable code pursuant thereto.

* * * * *

The court decided that the plaintiff was entitled to recover the sum of $1,120.56.

DRAVO CORPORATION v. THE UNITED STATES

[No. 44280. Decided May 5, 1941]

On the Proofs

Increased costs under National Industrial Recovery Act; indirect results of enactment.—Where contractor, engaged in the construction of a floating drydock for the Government, under a contract executed on March 9, 1933, increased hourly wages and decreased the work week in accordance with the Code of Fair Competition for the Shipbuilding and Ship Repair Industry, approved by the President pursuant to title I of the National Industrial Recovery Act on July 26, 1933; and where the Public Works Administration awarded contracts to another shipyard adjoining plaintiff's yard, on which contracts higher wages were stipulated than wages stipulated by the Code minimum and paid by plaintiff on its said contract; and where thereupon plaintiff's employes working on said drydock contract became dissatisfied and struck for higher wages; and where such strike was settled by the acceptance of a new wage scale as recommended by a conciliator from the Department of Labor, resulting in increased wage costs to plaintiff; it is *held* that plaintiff

is not entitled to recover for such increased wage costs so incurred, which were not "increased costs incurred as a result of the enactment of the National Industrial Recovery Act" within the meaning of the Act of June 25, 1938.

Same.—In the enactment of the Act of June 25, 1938, it was not the intention of Congress that such general occurrences as increases in the cost of living and the surrounding wage level, creating dissatisfaction with their income among the employes of one employer, were to be regarded as a compensable "result" of the enactment of the National Industrial Recovery Act.

Same; legal result of legal cause.—The "result" so intended by the 1938 Act was the legal result, determined by the usual principles of legal cause and legal liability.

Same; increases in accordance with President's Agreement.—Where contractor, engaged in the construction of a roller-gate dam near London, W. Va., and the installation of machinery for the Government under a contract executed November 26, 1932, signed the President's Reemployment Agreement for the construction industry July 31, 1933, and again, with modifications, September 2, 1933; and where after negotiations concerning certain changes in the contract originally proposed by the contracting officer and agreed to by the contractor but never approved by the Army Chief of Engineers, contractor made increases in wages in accordance with said proposal of the contracting officer and in accordance with said President's Agreement; it is *held* that plaintiff is entitled to recover for the increased costs so incurred.

Same.—The contractor, having agreed to take certain steps to comply with the National Industrial Recovery Act, took steps which purported to be in that direction and which are not shown to have deviated greatly therefrom.

Same; provisions of 1938 Act applicable to title II.—The provisions of the Act of June 25, 1938, are not limited to increased costs incurred by reason of compliance with the provisions of title I of the National Industrial Recovery Act.

Same.—Plaintiff, in making increases in the hourly wages of its unskilled labor employed on the London dam, and increases in wages in classifications above the unskilled grades, was acting in purported compliance with the President's Reemployment Agreement as well as with section 206 of title II of the National Industrial Recovery Act, and is entitled to recover under the provisions of the 1938 Act.

The Reporter's statement of the case:

Mr. Floyd F. Toomey for the plaintiff. *Mr. Ellsworth C. Alvord* was on the briefs. *Mr. John S. Mason* and *Alvord and Alvord* were of counsel.

Mr. Rawlings Ragland, with whom was *Mr. Assistant Attorney General Francis M. Shea*, for the defendant. *Messrs. Gaines V. Palmes* and *Elihu Schott* were on the briefs.

The court made special findings of fact as follows:

1. The petition herein was filed on November 28, 1938, pursuant to an Act of Congress approved June 25, 1938, which provides as follows:

> *Be it enacted by the Senate and House of Representative*[1] *of the United States of America in Congress assembled*, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgments against the United States upon the claims of contractors, including completing sureties and all subcontractors and materialmen performing work or furnishing material to the contractor or another subcontractor, whose contracts were entered into on or before August 10, 1933, for increased costs incurred as a result of the enactment of the National Industrial Recovery Act: *Provided*, That (except as to claims for increased costs incurred between June 16, 1933, and August 10, 1933) this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934 (41 U. S. C., secs. 28–33).
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> SEC. 2. Suits upon such claims may be instituted at any time within six months after the enactment of this Act or, at the option of the claimant, within six months after the completion of the contract. Proceedings for the determination of such claims, and appeals from and payment of any judgment thereon, shall be in the same manner as in the cases of claims over which such court has jurisdiction, as provided by law.
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> SEC. 3. Judgments or decrees, if any, under this Act, shall be allowed upon a fair and equitable basis, and notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res adjudicata, laches, or any provisions of Public Act Numbered 369, as enacted on June 16, 1934.
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> SEC. 4. This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

[1] So in original.

2. Since December 31, 1936, the plaintiff has been and is a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal place of business at Pittsburgh, Pennsylvania.

3. Prior to December 31, 1936, and at all times material herein, The Dravo Contracting Company was a corporation organized under the laws of the Commonwealth of Pennsylvania, with its principal office at Pittsburgh, Pennsylvania. On or about December 31, 1936, the plaintiff succeeded to the entire business, assets, and liabilities of The Dravo Contracting Company, including the claim hereinafter alleged.

4. The plaintiff is, and its predecessor was, engaged in a diversity of enterprises, including the maintenance of shipyards at Pittsburgh and at Wilmington; the construction of locks and dams, bridge piers, docks, and similar work; the operation of dredges, barges, and towboats, the sale and distribution, through its facilities, of sand, gravel, and concrete throughout the Pittsburgh area; and the sale and installation of power plant and waterworks machinery.

Plaintiff's Count I

5. On March 9, 1933, The Dravo Contracting Company (hereinafter referred to as the Company) entered into a contract with the defendant for the construction of a floating drydock to be delivered at Philadelphia, Pennsylvania, for the sum of $352,680.00. On March 30, 1933, upon due notice by the defendant, the Company commenced work under the contract. For changes in the work while in progress, the price to be paid under the contract was increased to $369,-892.45. The Company completed the contract on or about September 11, 1934, at a cost of $582,969.54. Completion thereof was accepted by the defendant, and the Company was paid $369,892.45.

6. In completing the contract referred to in finding 5, the Company incurred increased costs of $52,027.44 (exclusive of the increased costs incurred as a result of a wage increase on March 5, 1934) subsequent to August 10, 1933, as a result of the enactment of the National Industrial Recovery Act.

In addition to that amount, the Company incurred increased costs of $6,692.95 as a result of a wage increase on March 5, 1934 at the Wilmington plant, the facts with respect to which are as follows: (Findings 7–16).

7. The contract for the construction of the drydock permitted a 48-hour work week. On March 30, 1933, when the work was commenced, and until November 27, 1933, a work week of 44½ hours prevailed at the Wilmington plant.

8. A Code of Fair Competition for the Ship Building and Ship Repair Industry (hereinafter referred to as the Code) was approved by the President pursuant to Title I of the National Industrial Recovery Act on July 26, 1933. This Code provided for a maximum work week of 36 hours for merchant work and a maximum work week of 32 hours for Government work and specified the minimum hourly wages to be paid on that basis. With respect to the resulting weekly wages, the Code provided:

> The amount of differences existing prior to July 1, 1933, between the wage rates paid various classes of employees receiving more than the established minimum wage shall not be decreased. In no event shall any employer pay an employee a wage rate which will yield a less wage for a work week of thirty-six (35) hours than such employee was receiving for the same class of work for a forty (40) hour week prior to July 1, 1933. It is understood that there shall be no difference between hourly wage rates on commercial work and on naval work, for the same class of labor, in the same establishment.

9. On November 27, 1933, the Company increased the wages and decreased the hours of workers at the Wilmington plant. These adjustments met the provisions of the Code, and fully complied therewith. Because of the reduction in the work week from 44½ hours to 32 hours on Government work, and the application of the same hourly rate established for a 36-hour week on commercial work to the 32-hour week on Government work, as required by the Code, the weekly wages of employees engaged on Government work, after the adjustments were made, were about six percent less than formerly received for a 44½-hour week. The workers engaged on commercial work, who were permitted

by the Code to work 36 hours per week, received a weekly wage slightly in excess of that formerly received for a 44½-hour week.

10. Subsequent to the adoption of the code, the wage level throughout the Wilmington district was raised. Due to the increase in the cost of living and to the decrease in weekly earnings of employees engaged on Government work, those employees became dissatisfied. Between November 27, 1933, and February 13, 1934, the Public Works Administration awarded contracts to Pusey & Jones Company, which company operated a shipyard adjacent to the Company's Wilmington plant, for the construction of certain vessels for the Coast Guard. The weekly wages stipulated in these contracts were authorized by the P. W. A. and exceeded the weekly wages required by the Code and paid by the Company at its Wilmington plant. The weekly wages of other employees in the same area, who were permitted to work from 35 hours to 40 hours per week under the President's Reemployment Agreement, and under other codes, also exceeded the weekly wages of employees at the Company's Wilmington plant.

11. On February 13, 1934, as a result of the dissatisfaction caused by these conditions, the Company's employees on the drydock job struck for higher wages.

12. A committee representing the employees presented their views to the United States Department of Labor, which department, during the latter part of February 1934, sent a conciliator to the Wilmington plant in an effort to settle the dispute. The conciliator made a study of the local conditions and, after consulting with the representatives of the workers and with the management of the Company, a new wage schedule was proposed, and that schedule was accepted by both parties and put into effect on March 5, 1934, when work was resumed at the plant.

13. The Company on March 5, 1934, put into effect at the Wilmington plant a new wage schedule applicable to the workers affected by the strike, which increased the Company's cost in the sum of $6,692.95, and which exceeded the specific wage rates provided for by the Code. This increase in rates resulted from negotiations in connection with the

strike of the Company's employees, and represented the Company's endeavor to make an equitable readjustment of its pay schedules to meet existing conditions in the community.

On February 13, 1934, in a letter to the Bureau of Yards and Docks, the Company stated:

> The yard is operating under the wage scales and hours as contemplated by the Code of Fair Competition for the Shipbuilding and Shiprepairing Industry. It is our understanding that the workers now desire to be placed on a wage scale and hourly basis identical to that obtaining in connection with projects being constructed under P. W. A. regulations. * * *

On March 15, 1934, in a letter to the Chairman of the Shipbuilding and Ship Repairing Code Committee, the Company, in referring to the cause of the strike and the resultant wage increase stated:

> A strike or walk-out of the workmen in our yard occurred at starting time February 13th, 1934. The yard had been operating under the wage scales and hours contemplated by the Code of Fair Competition for the Shipbuilding and Shiprepairing Industry. The strikers demanded a wage scale and hourly basis identical to that obtaining in connection with projects being constructed under P. W. A. regulations. This condition was no doubt brought about by the fact that in the adjacent shipyard of Pusey and Jones a Coast Guard contract was being executed under these conditions and it was not understood by the workmen why Government work in one place should not be adjusted to the same basis of operations as that obtaining in the adjacent yard.

14. The minimum wage rate fixed by P. W. A. regulations for unskilled labor was 45¢ per hour, and for skilled labor $1.10 per hour. The workweek was limited under these regulations to 30 hours. The wage scales put into effect by the Company on November 27, 1933, established a rate of 45¢ per hour for unskilled labor, and varying rates up to 67¢ per hour for skilled labor. On March 5, 1934, the highest rate paid for skilled labor was increased to 71¢ per hour. The wage for unskilled labor was unchanged. On or about April 1, 1934, the Code was modified to permit employees engaged on Government work to work 36 hours per week.

15. In the performance of the contract for the construction of the drydock the Company incurred an increase of $52,027.44 in cost as a result of the enactment of the National Industrial Recovery Act of June 16, 1933. The increased cost of $6,-692.95, representing the increase in wages following the strike, was not a result of the enactment of the National Industrial Recovery Act.

16. On or about December 21, 1934, or within six months after the completion of the contract, the Company filed a claim for the increased costs referred to in finding 6 with the United States Navy Department for submission to the Comptroller General of the United States, pursuant to the Act of June 16, 1934 (48 Stat. 974). The Comptroller General informed the plaintiff of the disallowance of the claim by letter dated March 6, 1937.

Plaintiff's Count II

17. On August 30, 1932, the Company entered into a contract with the defendant for the construction of a roller-gate dam and the installation of a permanent lock gate, Marmet Lock and Dam, Kanawha River, near Marmet, West Virginia, for the sum of $908,557.48. On August 1, 1932, the Company commenced work under the contract. For changes in the work while in progress, the price to be paid under the contract was increased to $978,640.44. The Company completed the contract on or about April 6, 1934, at a cost of $1,009,783.08. Completion thereof was accepted by the defendant and the Company was paid $978,640.44.

18. In completing the contract referred to in finding 17 the Company incurred increased costs of $32,217.95, subsequent to August 10, 1933, as a result of the enactment of the National Industrial Recovery Act. These increased costs were occasioned by complying with the minimum wage and maximum hour provisions of the President's Reemployment Agreement.

19. On or about December 13, 1934, or within six months after the approval of the Act of June 16, 1934 (48 Stat. 974), the Company filed a claim for the increased costs referred to in finding 18, with the District Engineer, U. S.

Engineer Office, Huntington, West Virginia, for submission to the Comptroller General of the United States, pursuant to that Act. The Comptroller General informed the Company of the disallowance of the claim by letter dated June 22, 1936, affirmed by letters to plaintiff dated October 9, 1937, and March 10, 1938.

Plaintiff's Count III

20. On November 26, 1932, the Company entered into a contract with the defendant for the construction of a roller-gate dam, Lock B, alterations to the upper mitergate of Lock A, a powerhouse on the river side of Lock A, and the installation of powerhouse machinery and lock illuminating system, London Lock and Dam, Kanawha River, near London, West Virginia, for the sum of $1,640,217.97. On November 2, 1932, the Company commenced work under the contract. For changes in the work while in progress, the price to be paid under the contract was increased to $1,722,047.66. The Company completed the contract on or about June 25, 1934, at a cost of $1,668,134.62. Completion thereof was accepted by the defendant, and the Company was paid, or given credit for, $1,722,047.66.

21. In completing the contract referred to in finding 20 the Company incurred increased costs of $57,195.78, subsequent to August 10, 1933, of which the defendant concedes that not less than $23,485.46 was incurred as a result of the enactment of the National Industrial Recovery Act. The facts with respect to the balance of $33,710.32 are set forth in findings 22 to 45, inclusive, as follows:

22. The increased costs of $33,710.32 were incurred as a result of a wage increase at the site of the dam on September 16, 1933, allocated as follows:

Amount paid to labor in minimum wage group at the dam site in excess of 40¢ per hour as a result of increase of 9/16/33	$7,378.15
Increase in amount paid to other labor at the dam site as a result of increase of 9/16/33	26,332.17
Total	33,710.32

23. The contract for London Lock and Dam limited the work week to 30 hours. The contract for Marmet Lock and

Dam limited the work week to 48 hours. Prior to September 16, 1933 (the date of the increase now in question) the basic wages for the minimum wage group at both projects were as follows:

Project	Hourly rate	Workweek	Weekly wage
London Lock & Dam	30c	30 hrs	$9.00
Marmet Lock & Dam	30c	48 hrs	14.40

The hourly rates for the other classifications of workers were substantially the same at both projects, giving rise to proportionate differences between the weekly wages at London and at Marmet.

24. The Company executed the President's Reemployment Agreement for the construction industry July 31, 1933, and, again, with modifications, September 2, 1933. In the original agreement the contracts for the construction of the London Lock and Dam and Marmet Lock and Dam were, among others, excepted in general terms.

The modified agreement of September 2, 1933, contained the following provisions with respect to hours and wages:

> 3. *Minimum wages.*—Employers in the Construction Industry shall pay wages—
>
> (a) Not less than the minimum rate of wages for unskilled labor hereby established which shall be not less than forty cents (40¢) per hour unless the hourly rate for the same class of work on July 15, 1929, was less than forty cents (40¢) per hour, in which case the hourly rate shall be not less than that of July 15, 1929, and in no event less than thirty cents (30¢) per hour, and furthermore, in any event
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> (b) Not less than the minimum rate of wages for accounting, clerical, or office employees hereby established as follows: $15 per week in any city of over 500,000 population, or in the immediate trade area of such city; $14.50 per week in any city of between 250,000 and 500,000 population, or in the immediate trade area of such city; $14 per week in any city of between 2,500 and 250,000 population, or in the immediate trade area of such city; and $12 per week in towns of less than 2,500 population. Population shall be determined by the 1930 Federal census.

(c) Nothing herein contained shall be construed to apply to employees whose rates of wages are established for specific projects by competent governmental authority in accordance with law or with rates of wages established by contracts now in force.

4. *Maximum hours.*—Employers in the Construction Industry shall not employ any employee—

(a) In excess of the maximum average of thirty-five (35) hours a week during a six months' calendar period, or forty-eight (48) hours in any week in such period, or eight (8) hours in any one day, excluding employees engaged in professional, excecutive, administrative, or supervisory work; those engaged in cases of emergency work requiring the protection of life or property, and those in establishments employing not more than two persons in towns of less than 2,500 population, which towns are not part of a larger trade area. Population shall be determined by the 1930 Federal census.

(b) Employers shall not employ accounting, clerical, or office employees in any office or in any place or manner for more than forty (40) hours in any week, excluding employees in managerial or executive capacities and those in establishments employing not more than two persons in towns of less than 2,500 population, which towns are not part of a larger trade area. Population shall be determined by the 1930 Federal census;

(c) Nothing herein contained shall be construed to apply to employees whose hours of labor are established for specific projects by competent governmental authority acting in accordance with law or with hours of work established by contracts now in force.

The Company further agreed:

Not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules.

The agreement signed on September 2, 1933, thus did not affect the 30-hour week established by the contract for the work at the London Lock and Dam. There was no provision excepting that work generally from the operation of the agreement.

25. Shortly after the passage of the National Industrial Recovery Act of June 16, 1933, the Government entered into

negotiations for changing existing contracts for construction work entered into prior to June 16, 1933, to conform to the provisions of the National Industrial Recovery Act relating to minimum wages and maximum hours, and to provide reimbursement from funds authorized by the act to contractors, covering increased costs thus incurred. The proposed change was to be made by entering into supplementary agreements. The minimum wage to be paid unskilled labor under the proposed agreement was 45¢ per hour.

Shortly prior to June 30, 1933, the Company and defendant's contracting officer entered upon such negotiations, relative to proposed increases in hourly wages at the London Lock and Dam and at the Marmet Lock and Dam.

As a result of these negotiations the contracting officer June 30, 1933, transmitted to the Company a proposed supplemental agreement for London Lock and Dam. The letter stated that the agreement was for the purpose of placing this contract for constructing London Lock "B" and Dam under the terms of the National Industrial Recovery Act. This agreement provided for an increase from 30¢ to 35¢ per hour for labor in the minimum-wage group or for a resulting weekly wage of $10.50. No increase was provided for any workers receiving 35¢ or more. A similar agreement was transmitted for Marmet Lock and Dam.

26. By letter of July 1, 1933, the Company refused to execute these agreements on the ground that the proposed resulting weekly wage was insufficient to comply with the spirit and intent of the National Industrial Recovery Act.

By letter of July 7, 1933, the Company wrote the Chief of Engineers as follows:

> Your supplemental agreement for the London job calls for increasing only the 30¢ men to 35¢. This would result in an increased pay-roll cost which you agreed to absorb, of only $8,200.00. However, if we increase the rate of the 30¢ men we cannot avoid making a corresponding increase to the higher paid employees, and when it is remembered that out of the estimated remaining 416,400 man-hours only 164,000 man-hours are at the rate of 30¢, we find that if the balance, or 252,400 man-hours, are increased at the same rates you name for Marmet, the increase for these higher rated men would amount to

$17,000.00. This you apparently want us to absorb, together with public liability and workmen's compensation, and all fixed charges to be added thereto. Any agreement such as this is obviously unfair.

27. In response to a request of the contracting officer dated July 13, 1933, and following a conference between the Company and a representative of defendant, the Company on July 18, 1933, submitted an estimate of increased costs of transferring the contracts to the National Industrial Recovery Act, as follows:

Classification	Weekly wage	Hourly rate for 30-hour week
Common laborers	$14.86	$0.49
Handymen	19.20	.64
Carpenters	25.50	.85
Crane operators	32.40	1.08
Mechanics	30.61	1.02
Blacksmiths and pipe fitters	28.00	.93

The weekly wages at the Marmet Lock and Dam, by reason of the 48-hour week, compared favorably with the prevailing wages in the area. However, by reason of the 30-hour week, the weekly wages at the London Lock and Dam were substantially below the prevailing weekly wages in the area. As a result, the turn-over at the London Lock and Dam amounted to approximately 60% of the total men employed per month, while the turn-over at the Marmet Lock and Dam amounted only to approximately 2% of the total men employed per month.

28. By letter dated July 25, 1933, the contracting officer transmitted to the Company a revised supplemental agreement which he described as follows:

> I am forwarding to you herewith, in triplicate, a supplemental agreement for your signature, for the purpose of placing your contract for constructing London Lock "B" and Dam, Kanawha River, under the terms of the National Industrial Recovery Act. These papers should also be executed by the surety companies.
>
> The payments provided for in this agreement cover my well-considered determination as to the actual additional cost to you for prosecuting this work under the new law. They are based on the amount of work to be

> completed on your contract on and after August 1, 1933, which is the effective date of the agreement. The data submitted by you have been given consideration.

The revised supplemental agreement provided for a continuation of the 30-hour week and for the following increases in the hourly wages:

Classification	Old rates	New rates	Rate difference
Steel workers	$0.65	$0.85	$0.20
Electricians	.47	.75	.28
Mechanics	.65	.70	.05
Do	.60	.70	.10
Do	.45	.70	.25
Carpenters	.50	.75	.25
Painters	.40	.65	.25
Handymen	.40	.55	.15
Do	.35	.55	.20
Firemen	.35	.50	.15
Common labor	.30	.45	.15

29. Prior to July 31, 1933, the revised supplemental agreement was duly executed by the contracting officer, by the Company, and by the sureties, and was transmitted to the Chief of Engineers for approval. The Company was prepared to increase the wages in accordance therewith on August 1, 1933. On July 31, 1933, the Company received the following telegram from the contracting officer:

> Supplemental agreements for placing Marmet and London contracts under National Recovery Act will not be approved by Chief of Engineers for the present Stop Take no steps toward putting your work on minimum wage or reduced hour basis until agreements are approved

30. The Comptroller General of the United States issued a ruling dated August 11, 1933, in the case of the United States Penitentiary, Atlanta, Georgia, and the Delta Finishing Company, in which he held that the contracting officers of the Government did not have the authority to increase the compensation provided for in existing contracts.

31. The Attorney General of the United States rendered an opinion dated August 24, 1933, addressed to the President, in which he concluded as follows:

> I, therefore, have the honor to advise you that heads of executive departments and independent establishments

have the power and authority to enter into supplemental contracts based upon good and valuable consideration, with persons who made contracts with the Government prior to the date of the passage of the National Industrial Recovery Act (Act of June 16, 1933), for the delivery of materials or the performance of labor subsequently to such date, agreeing to reimburse such persons for increased costs incurred by them as a result of the operation of the industrial codes or of the President's Reemployment Agreement. The consideration upholding the validity of such supplemental contracts may consist of the contractor's adherence to and compliance with the applicable code or codes, or with the President's Reemployment Agreement.

32. Between July 31 and September 16, 1933, representatives of the Company and defendant continued to have conferences and the Company continuously expected approval of the supplemental agreement by the Chief of Engineers.

33. On or about September 16, 1933, the Company increased the wages of employees at the London and Marmet projects. The work week at Marmet was reduced from 48 hours to 35 hours to conform to the requirements of the President's Reemployment Agreement. Since the work week at London was limited by the contract to 30 hours, no change was made in the work week at that project.

34. On September 16, 1933, the Company notified the Chief of Engineers and the Division Engineer by letter as follows:

> We have today put into effect a wage increase at London lock and dam and on Monday we will put into effect the 35-hour week with increased wages at Marmet dam. This places both of these jobs in accordance with the President's Blanket Agreement and for your information our signature to the blanket agreement has been accepted and approved by the proper Governmental authority.
>
> In our opinion our signature to and the acceptance and approval by the Government of this President's Blanket Agreement obligates the Government as buyer to reimburse ourselves as seller, for such increased cost to us as is occasioned by our fulfilling the spirit and intent of this blanket agreement.

On the same date the Company also wrote the contracting officer as follows:

> For your information we have signed the President's Blanket Agreement and are endeavoring to assist in

every way, with the end in view of helping to make N. R. A. 100% successful. It is further assumed that the intent of the supplemental agreements as of August 1st will be carried out and that eventually we will be reimbursed by the Government as buyer, for the increased cost to us as seller, occasioned by this action. This is in line with the President's blanket agreement which we have signed and which has been accepted and approved by the proper governmental authority which we feel makes the Government a party to this Agreement.

On September 18th the Company again wrote the contracting officer:

> For your information we have signed the President's Blanket Agreement, and are endeavoring to assist in every way with the end in view of helping to make the N. R. A. successful. Our signing of the President's Blanket Agreement and the acceptance and approval thereof by the proper authorities, would indicate that the Government will accept their responsibility as buyer to reimburse ourselves as seller for any increase in cost occasioned by our signing and living up to this agreement. As a matter of fact the President has indicated on at least one occasion that such would be done.
>
> Kindly advise whether the method above outlined of submitting data as to the amount of increased cost monthly meets with your approval.

On September 22, 1933, the Acting Chief of Engineers wrote the Company as follows:

> I take pleasure in acknowledging the receipt of your letter of September 16, 1933, and in expressing the gratification of this Department on behalf of the Administration that you have applied the President's reemployment agreement to the work being done under your contracts for the London Lock and Dam and the Marmet Dam on the Kanawha River.
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> I regret that under a recent ruling of the Comptroller General no funds now available to the Department may be used to reimburse your company for such increased cost as is occasioned by your fulfillment of the spirit and intent of this agreement. The general question of the adjustment of contracts to meet increased costs under the National Recovery Act is now being considered by the Administration, and it is expected that an announcement in the premises will be made at an early date.

On September 22, 1933, the contracting officer advised the Company by letter as follows:

> Referring to your letter of September 18 in connection with the change of hours and wages at Marmet Dam, we have, as yet, no instructions as to the manner in which data as to changes made in your hours and wages should be recorded, and until such instructions are received we will be very glad to receive the data in the form in which you propose to furnish it.
>
> You understand, of course, that you are not required to furnish us data of this kind.
>
> Your attention is also invited to the decision of the Comptroller of the Treasury [sic] dated August 11, 1933, in the case of the United States Penitentiary at Atlanta, Ga., and the Delta Finishing Company, which indicates that there is no legal authority now existing for paying any different prices than were originally paid in contracts of this kind.

By letter dated October 7, 1933, the contracting officer wrote the Company as follows:

> Referring to supplemental agreements dated July 26, 1933, under which it was proposed to change the above contracts for constructing Marmet Dam and London Lock "B" and Dam, Kanawha River, to provide for conversion to the basis of the National Industrial Recovery Act, you are advised that it has definitely been determined that the terms of this class of contracts, entered into under the regular appropriations, will not be changed as contemplated but will be continued under their original terms.

35. The increase from 30¢ to 45 cents per hour for labor in the minimum-wage group was put in effect at the London Dam and resulted in a weekly wage of $13.50. The defendant concedes that an increase from 30¢ to 40 cents was required by the President's Reemployment Agreement. The increase of 5 cents in addition to the required increase to 40 cents amounted to $7,378.15.

36. There are no provisions of the President's Reemployment Agreement under which the Company operated subsequent to September 16, 1933, which require that employees should be paid a fixed sum per week; the only provisions affecting the Company's contract are that employees be paid not less than 40¢ per hour and that the work week be not in excess of 35 hours.

37. In addition to increasing the minimum wage five cents per hour in excess of that required by the President's Reemployment Agreement, the Company also, on September 16, 1933, increased wages of employees receiving more than the minimum wage of 40¢ per hour at the London project. These increases amounted to $26,332.17.

38. The wages paid to labor in this group after September 16, 1933, were substantially in conformity with the wages prescribed in the proposed supplemental agreements, which had been agreed upon by the Company and the contracting officer, but which had never been made effective.

39. The minimum weekly wage which was established in strict conformity with the President's Reemployment Agreement for the Marmet Lock and Dam, only fifteen miles distant from the London Lock and Dam, was based upon an hourly wage of 40¢ for a work week of 35 hours, resulting in a weekly wage of $14.00.

40. The prevailing minimum weekly wages in the area were in excess of $14.00 per week.

In a contract dated October —, 1933, for the construction of the Winfield Lock and Dam on the Kanawha River, within the same area as the London Lock and Dam, the minimum wage was specified at 45¢ per hour. The specifications for the Winfield contract were issued under date of September 5, 1933.

41. The Board of Public Works adopted a resolution, under the authority of the National Industrial Recovery Act, specifying a wage of 45¢ per hour for common labor in the Central Zone, in which the London Lock and Dam was situated. Pursuant to Bulletin No. 51 of the Federal Emergency Administration of Public Works, dated September 7, 1933, contractors were advised that this wage must be paid on all construction financed from funds appropriated by the Administrator of Public Works.

42. On May 8, 1935, in connection with claims filed under Public Act 369, 73d Congress (48 Stat. 974), the contracting officer wrote the Company as follows:

* * * * *

1. It is not clearly shown that increased costs as claimed "were directly increased by reason of compli-

ance with a code or codes of fair competition or with an agreement with the President."

* * * * *

Your Schedule XIV, Items 1 and 2, submitted with your claim, shows individual and group labor rate increases ranging from 6 percent to 45 percent and from 12 percent to 64 percent, respectively, indicating that there may have been factors contributing to the establishment of the new wage scale other than compliance with the President's agreement or subsequent code which provided merely that no employee shall be paid less than 40 cents per hour and that other rates shall be raised by equitable adjustment to insure that no employee shall receive less compensation per week than formerly despite the fact that his hours of work may be reduced. It has not shown wherein the hours of labor have been reduced to necessitate increases in some instances as high as 64 percent and further why such increases as were necessary to comply with the act were not uniform and equitable as provided by the act. It cannot be assumed that whereas certain wage rates were in effect as of a certain date, all fluctuations thereafter are due to said compliance.

On June 28, 1935, the Company responded by letter as follows:

We signed the President's Blanket Agreement July 31, 1933, and rate and hour changes were made at that time on all work other than that at Marmet and London. The change in rates at Marmet and London were held up until September 16, 1933, for the reason that it was expected that the supplemental agreements mentioned above would be put into effect. After being informed that these supplemental agreements could not be entered into under the then existing conditions, it was decided to revise the wage rates in full compliance with N. R. A. and to depend on the President's promise that proper reimbursement would be made for such compliance.

* * * * *

In making our rate changes to comply initially with the President's Reemployment Agreement and later with the codes we were not governed by factors other than those inherent in a proper interpretation of the requirements and we call your attention to the following provisions of the President's Reemployment Agreement

as providing not only for a minimum wage but to "increase the pay for such employment (those receiving in excess of the minimum) by an equitable readjustment of all pay schedules."

Under conditions prior to the introduction of the President's Agreement, various classes of labor worked various hours per day and per week. The application of the provisions of the President's Agreement brought all classes of labor to a uniform maximum hour basis with resultant variations in percentages of increases when making equitable adjustments. For example, we could no longer give employment to night watchmen twelve (12) hours per night, seven (7) days per week, still an equitable adjustment was a requirement at the time of compliance with the President's Reemployment Agreement.

Paragraph 7 of the specifications covering the London project reads:

> Under the above-quoted law no individual (except in executive, administrative, or supervisory positions) will be permitted to work more than 30 hours in any one week except on the written decision of the contracting officer that such limitation on the hours of employment is not practicable.

Under date of February 16, 1934, the Company wrote the contracting officer as follows:

> Whereas it has until this time been practicable to carry on the operations contemplated under the contract, the conditions now obtaining appear to be such that further prosecution of the work cannot be carried on except at most unreasonable and excessive increase in cost.
>
> * * * It is our opinion that a written authorization of the Contracting Officer to the effect that such limitation in the hours of employment as provided for under Paragraph 7 of the specifications (namely, 30 hours per week) is not now practicable and an authorization by the Contracting Officer permitting employment on the project of not in excess of 40 hours per week should make it possible to again carry on the work.

In another letter of the same date to the contracting officer, the Company further stated:

> Paragraph 7, Page 7, of the specifications covering the work at London, states as follows:

"Under the above-quoted law no individual (except in executive, administrative, or supervisory positions) will be permitted to work more than thirty hours in any one week *except on the written decision* of the contracting officer that such limitation on the hours of employment is not practicable."

The above-quoted paragraph indicates that it is within the power of the contracting officer to authorize the contractor to work longer hours if he feels that it is advisable so to do, and as a matter of fact we understand that the contracting officer at Chattanooga increased the working period from 30 to 40 hours per week on Lock No. 3, Tennessee River, and apparently for the same reasons as set forth in our letters of today.

There has been an increasing trend among our men at London to leave the London job for P. W. A. work, and this is considerable of a hardship on the contractor for the reason that the work at London was taken before the National Recovery Act was passed by Congress; consequently at a much lower figure.

* * * * *

On February 24, 1934, the contracting officer, by letter, replied:

* * * * *

Investigation has revealed that the unusually severe weather has decreased the efficiency of available labor to such an extent as to impede the anticipated progress of the work, that sufficiently skilled labor is not locally available to enable you to complete the contract within the specified time, and that the extent of the work remaining to be done is not sufficient to attract the necessary labor from distant sources.

It has therefore been determined that the application of the 30-hour week to this work is not practicable, and, in accordance with the provisions of paragraph 7 of the specifications of Contract No. W516eng.–642, work upon the 40-hour-week basis is authorized.

43. No written request previous to those made on February 16, 1934, was made by the Company to modify the contract so that employees could be worked 40 hours per week instead of 30 hours.

44. The increased costs resulting from the wage increase in excess of the minimum specified in the President's Reemployment Agreement, in the case of unskilled labor, and

the increased wages paid to other classes of labor were the result of the enactment of the National Industrial Recovery Act.

45. On or about December 13, 1934, or within six months after the completion of the contract referred to in finding 20, the Company filed a claim for the increased costs with the District Engineer, U. S. Engineer Office, Huntington, West Virginia, for submission to the Comptroller General of the United States, pursuant to the Act of June 16, 1934 (48 Stat. 974). The Comptroller General informed the plaintiff of the disallowance of the claim by letter dated May 3, 1937, affirmed by letter dated March 23, 1938.

Plaintiff's Count IV

46. On January 10, 1933, the Company entered into a contract with The Vang Construction Company to furnish and deliver a lock gate and anchorage for Lock No. 2, Allegheny River, as subcontractor under a contract dated November 9, 1932, between The Vang Construction Company and the defendant, for the construction of Lock and Dam No. 2, Allegheny River. On January 23, 1933, the Company commenced work under its contract with The Vang Construction Company. The Company completed the contract on or about November 6, 1933, at a cost of $16,975.57. Completion thereof was accepted by The Vang Construction Company and by the defendant, and the Company was paid $14,-882.30. The Vang Construction Company completed the general contract on or about October 27, 1934.

47. In completing the contract referred to in finding 46 the Company incurred increased costs of $520.09 subsequent to August 10, 1933, as a result of the enactment of the National Industrial Recovery Act. These increased costs were occasioned by complying with the minimum-wage and maximum-hour provisions of the President's Reemployment Agreement.

48. On or about January 9, 1935, or within six months after the completion of the general contract, the Company filed a claim for the increased costs with the District Engi-

neer, U. S. Engineer Office, Pittsburgh, Pennsylvania, for submission to the Comptroller General of the United States, pursuant to the Act of June 16, 1934 (48 Stat. 974). The Comptroller General informed the Company of the disallowance of the claim by letter dated April 7, 1936.

Plaintiff's Count V

49. On January 10, 1933, the company entered into a contract with The Vang Construction Company to furnish and deliver a lock gate and anchorage for Lock No. 3, Allegheny River, as subcontractor under a contract dated November 9, 1932, between The Vang Construction Company and the defendant, for the construction of Lock No. 3, Allegheny River. On January 23, 1933, the company commenced work under its contract with The Vang Construction Company. The Company completed the contract on or about December 26, 1933, at a cost of $14,494.76. Completion thereof was accepted by The Vang Construction Company and by the defendant, and the company was paid $12,300. The Vang Construction Company completed the general contract on or about July 16, 1934.

50. In completing the contract referred to in finding 49 the Company incurred increased costs of $518.33 subsequent to August 10, 1933, as a result of the enactment of the National Industrial Recovery Act. These increased costs were occasioned by complying with the minimum wage and maximum hour provisions of the President's Reemployment Agreement.

51. On or about January 9, 1935, or within six months after the completion of the general contract, the company filed a claim for the increased costs with the District Engineer, U. S. Engineer Office, Pittsburgh, Pennsylvania, for submission to the Comptroller General of the United States, pursuant to the Act of June 16, 1934 (48 Stat. 974). The Comptroller General informed the plaintiff of the disallowance of the claim by letter dated April 7, 1936.

52. The total increased costs incurred by plaintiff as a result of the enactment of the National Industrial Recovery

Act in completing the five contracts referred to herein amounted to $142,479.59, as follows:

Count I	$52,027.44
Count II	32,217.95
Count III	57,195.78
Count IV	520.09
Count V	518.33
Total	142,479.59

All increases in costs in excess of this amount were due to causes other than the enactment of the Act.

The court decided that the plaintiff was entitled to recover.

MADDEN, *Judge*, delivered the opinion of the court:

This action was brought pursuant to the Act of Congress, approved June 25, 1938, 52 Stat. 1197, conferring jurisdiction on the Court of Claims to hear, determine and enter judgment against the United States upon the claims of contractors who performed work or furnished materials on contracts with the United States entered into on or before August 10, 1933, and whose costs were increased as a result of the enactment of the National Industrial Recovery Act. There are five contracts involved, each of which is set forth in a separate count in plaintiff's petition. With respect to Counts II, IV, and V there is no dispute as to plaintiff's right to recover nor the amount of recovery. The disagreement between the parties relates to the two transactions covered by Counts I and III. Count I involves a contract for the construction of a floating drydock to be delivered at Philadelphia, Pa., and Count III a contract for the construction of a power house, lock, dam and other facilities on the Kanawha River, near London, West Virginia.

The Philadelphia contract was made on March 9, 1933, and the work was completed on or about September 11, 1934. The defendant paid the Company the agreed price of $369,892.45. The Company incurred increased labor costs, as to $52,027.44 of which defendant concedes plaintiff is entitled to recover. As to $6,692.95, the parties are in disagreement. The circumstances are as follows.

The contract for the drydock permitted a maximum work week of 48 hours. In fact, a work week of 44½ hours prevailed at the Company's Wilmington plant, where the work was done, until November 27, 1933. A Code of Fair Competition for the Shipbuilding and Ship Repair Industry was approved by the President pursuant to Title I of the National Industrial Recovery Act on July 26, 1933. It provided for a maximum work week of 32 hours on government work and 36 hours on nongovernment work, and set the same minimum hourly wages for both kinds of work. The Company on November 27, 1933, reduced its hours on the drydock job to 32, and increased the hourly wages to the code minimum. Because of the reduced hours, the weekly wages were 6% less than they had been before.

The wage level in the area generally went up. The Public Works Administration of the defendant awarded shipbuilding contracts to another contractor whose yard adjoined the Company's and stipulated for wages higher than those required by the Code minimum and paid by the Company at its Wilmington plant. The Company's employees working on the drydock job became dissatisfied and on February 13, 1934, struck for higher wages. A conciliator from the United States Department of Labor studied the situation and proposed to the parties a new wage schedule which was accepted and put into effect on March 4, 1934, when work was resumed. This wage schedule cost the Company $6,692.95 in additional wages in the completion of the contract.

We think that the $6,692.95 was not "increased costs incurred as a result of the enactment of the National Industrial Recovery Act" within the meaning of the 1938 act here relied upon. If Congress meant in the 1938 act that such general occurrences as increases in the cost of living and the surrounding wage level, creating dissatisfaction with their income among the employees of one employer, were to be regarded as a compensable "result" of the enactment of the National Industrial Recovery Act, practically every wage increase occurring during the period here in question, anywhere in the country where government work was done, would come within the scope of the statute. But these

occurrences accompany in greater or less degree every improvement in business conditions. It was no doubt the purpose of the National Industrial Recovery Act to bring about such an improvement, and hence plaintiff may logically argue that where there is a purpose, a result in accordance with that purpose cannot be disclaimed. But even though the Recovery Act be given credit for the improved business conditions, and the improved business conditions be regarded as the cause of the Company's employees' demand for higher wages, we still have to determine whether Congress intended that a secondary consequence of the Recovery Act, such as this, should be compensated. We think not. We think rather that Congress intended the "result" to be compensated to be the legal result, determined by the usual principles of legal cause and legal liability. These are elusive enough, at best, but they would not permit a conclusion that government activity designed to improve economic conditions was the legal cause of a strike for higher wages.

The conduct of the conciliator of the Department of Labor in proposing an increase in wages for the purpose of settling a strike of the Company's workers was not attributable to the National Industrial Recovery Act. It was a normal activity of another unit of the United States Government. The award by the Public Works Administrator to a neighboring shipbuilder of a contract stipulating a higher minimum wage than that paid by the Company presents a more troublesome problem since the Public Works Administration was created under Title II of the National Industrial Recovery Act. Nevertheless we do not believe that Congress, in the 1938 Act, meant that an increase in the wage bill of another employer with whom the Public Works Administration had no dealings was to be compensated merely because that Administration's activity was one of several factors contributing to the dissatisfaction and the strike which brought about the increase.

The claim covered by Count III of plaintiff's petition relates to the London, West Virginia, contract. The contract was made November 26, 1932, and the work was completed on or about June 25, 1934. The defendant paid the

Company, or credited it with, the contract price of $1,722,047.66. In completing the contract, the Company incurred increased labor costs of $57,195.78 after August 10, 1933. The defendant concedes that not less than $23,485.46 of that sum was incurred in such circumstances as to be compensable under the 1938 Act. The disputed balance of $33,710.32 may be divided as follows: (1) The amount in excess of 40 cents per hour paid to labor in the minimum wage group after a raise given September 16, 1933; (2) the amount of addition to wages of employees other than those in the minimum wage group after a raise given on the same date.

The Company executed the President's Reemployment Agreement for the construction industry July 31, 1933, and his modified agreement September 2, 1933. The July 31 agreement excepted the London operation from its provisions, but the September 2 agreement did not. The defendant concedes that the Company was required by the agreement to raise its minimum wages to 40 cents per hour.

One provision of the President's Reemployment Agreement (section 7) was a promise on the part of the Company "not to reduce the compensation for employment now in excess of the minimum wages hereby agreed to (notwithstanding that the hours worked in such employment may be hereby reduced) and to increase the pay for such employment by an equitable readjustment of all pay schedules."

Shortly after the enactment of the National Industrial Recovery Act of June 16, 1933, the defendant entered into negotiations with contractors doing construction work for it, looking toward supplementary agreements changing existing contracts to make them conform to the wage and hour provisions of that Act, and reimbursing the contractor for increased costs caused thereby. Such negotiations between defendant's contracting officer and the Company relative to the London job began before June 30, 1933. On that date the contracting officer proposed, and on July 31 the Company rejected, a supplemental agreement increasing from 30 cents to 35 cents an hour the wages of the minimum wage group. The Company's stated reason was that if it increased the wages of that group, it would be obliged to make

corresponding increases in the wages of its other employees, and would thus have to make an outlay much larger than that compensated by the proposed agreement.

On July 18 the Company at the request of the contracting officer submitted an estimate of increased hourly wage rates which it would pay if it completed the contract under the provisions of the Recovery Act. On July 25 a revised supplemental agreement prepared by the contracting officer was submitted by him to the Company, and, within the following few days executed by him, the Company and its sureties and transmitted to the Chief of Engineers for approval. This agreement set forth a continuation of the thirty hour week and a schedule of increased rates of pay for all classes of labor on the London job, common labor being increased from 30 to 45 cents, and other classifications receiving increases ranging from five cents an hour for one grade of mechanics to twenty eight cents an hour for electricians.

On July 31 the contracting officer telegraphed the Company that the supplemental agreement would not, for the present, be approved by the Chief of Engineers and advised it to "take no steps toward putting your work on minimum wage or reduced hour basis until agreements are approved." The Comptroller General of the United States on August 11 issued a ruling in another case that contracting officers had no authority to increase the compensation provided for in existing contracts. On August 24 the Attorney General of the United States rendered a written opinion to the President in which he advised that heads of executive departments and independent agencies could, in consideration of a contractor's adherence to and compliance with a code or with the President's Reemployment agreement, make a binding agreement to reimburse the contractor for resulting increased costs.

Though negotiations for the supplemental agreement continued, the agreement was never approved by the Chief of Engineers. About September 16, 1933, the Company increased the wages of employees at the London project in the amounts set forth in the supplemental agreement. The

Company wrote the Chief of Engineers on September 16, advising him of its action, referring to the President's Reemployment Agreement and stating its opinion that the defendant was obligated to reimburse the Company for the resulting increased costs. It similarly advised the contracting officer. On September 22 the Acting Chief of Engineers wrote the Company expressing the gratification of the department on behalf of the administration, but advising that the question of reimbursement was still unsettled and under consideration by the administration. On October 17, 1933, the contracting officer wrote the Company that it had been definitely determined that the terms of the contract would not be changed.

Our question, as we have said, is whether the Company is entitled to be compensated for the extra five cents per hour which it added to the wages of its unskilled labor, or for any of the increases which it made in wages in classifications above the unskilled grade.

The Company signed the President's Reemployment Agreement. It therein agreed that it would pay a minimum wage of not less than 40 cents an hour (section 6) and would work its employees not more than 35 hours a week (section 3). The Company was limited by its London contract to a thirty-hour work week and it set a minimum wage of 45 cents an hour there to produce approximately the same weekly wage which the maximum work week at the minimum wage would produce. The minimum rate of 40 cents for a thirty-hour week would have produced a weekly wage substantially below the prevailing wage in the area.

As to the other classifications of employees above the lowest wage group, the Company had agreed, when it signed the President's Reemployment Agreement, that it would "increase the pay for such employment by an equitable readjustment of all pay schedules." This promise, though vague, was intended to be binding, and the defendant cannot say that the Company should have disregarded it. As to whether the increases were "equitable," it will be remembered that they were proposed by the defendant's contract-

ing officer at a time when he supposed that the defendant was going to have to pay for them. They were not indiscriminate, but varied widely as to the different classifications, showing an apparent effort to make a nice adjustment, though the men in the classification receiving small increases would certainly be critical of the differentials.

We are aware that there entered into the Company's decision elements in addition to enthusiasm for the Recovery Act. Among other things it hoped to stop the rapid turnover in its labor force at London. It also hoped, and for a time may have expected, that the defendant would pay the increased costs by a modification of the contract. But these facts are, we think, immaterial. What is material is that the Company, having agreed to take certain steps to comply with the Recovery Act, took steps which purported to be in that direction and which are not shown to have deviated greatly from that direction. We think that the increased wage costs at London were "incurred as a result of the enactment of the National Industrial Recovery Act."

The defendant urges that the 1938 Act intends only to compensate for increased costs resulting from the enactment of Title I of the National Industrial Recovery Act. It bases this argument on the language of the proviso in the 1938 Act which is as follows:

> *Provided*, That (except as to claims for increased costs incurred between June 16, 1933, and August 10, 1933) this section shall apply only to such contractors, including completing sureties and all subcontractors and materialmen, whose claims were presented within the limitation period defined in section 4 of the Act of June 16, 1934.

It urges that since the 1934 Act, 48 Stat. 974, U. S. Code, Title 41, secs. 28–33, had been limited to increased costs incurred by reason of compliance with a Code of Fair Competition, or with the President's Reemployment Agreement, both of which were contained in Title I of the Recovery Act, the proviso in the 1938 Act shows that it was intended to be similarly limited.

There is some basis for this argument. The fact that suits could not, in general be brought under the 1938 Act

except where claims had been filed under the 1934 Act is some indication that Congress was thinking of the two acts as having similar scope. We think, however, that this evidence of intent is not sufficient to overcome the broad and unqualified language of the 1938 Act. The fact that the language of the 1934 Act was limited to Title I and the language of the 1938 Act was not urges strongly against the narrow interpretation. Even if the argument were valid, the Company here was acting in purported compliance with the President's Reemployment Agreement as well as with Section 206 of Title II, and can, therefore, claim the benefits of the 1938 Act.

Plaintiff, on Count III, is entitled to recover $57,195.78. On Count I it is entitled to recover $52,027.44. The amounts due under Counts II, IV, and V total $33,256.37. Plaintiff is entitled to recover in all the sum of $142,479.59. It is so ordered.

JONES, *Judge;* LITTLETON, *Judge;* and WHALEY, *Chief Justice*, concur.

WHITAKER, *Judge*, took no part in the decision of this case.

JUDGMENTS ENTERED

ON MARCH 12, 1941

In accordance with the provisions of the Act of June 25, 1938, on motion of the several plaintiffs (to which no objection had been filed by the defendant), and upon the several stipulations by the parties, and in accordance with the recommendation of a commissioner in each case recommending that judgment be entered in favor of the plaintiffs in the sums named, it was ordered that judgments be entered as follows, for increased costs under the National Industrial Recovery Act:

No. 44288. Knoxville Iron Company	$2, 374. 78
No. 44332. Southern Ornamental Iron Works	102. 82
No. 44384. The Miller Bros. Pen Co	1, 095. 47

PETITIONS DISMISSED

Cases under the Act of June 25, 1938, in which petitions were dismissed.

ON MARCH 3, 1941

44132. The American Rolling Mill Co.
44177. A. S. Schulman Electric Co., a Corporation.
44329. Hewitt Rubber Corporation, a Corporation.
44397. General Bronze Corporation.
44436. Penn Metal Co. of Penna.
44550. R. C. A. Manufacturing Company, Inc.

ON APRIL 7, 1941

44225. Clyde E. Speer Coal Co.
44227. A. J. deKoning.
44328. Jacob Hyman et al.
44576. Atlantic Marble & Tile Co.



CASES DECIDED

IN

THE COURT OF CLAIMS

March 3, 1941, to June 2, 1941

INCLUSIVE, IN WHICH, EXCEPT AS OTHERWISE INDICATED, JUDGMENTS WERE RENDERED WITHOUT OPINIONS

No. 44338. JUNE 2, 1941

Joseph Strauss.

Pay and allowances; retired admiral on active duty; no appropriation. Decided upon the authority of *Dickerson* v. *United States*, 310 U. S. 554.

Opinion on motion for new trial, 92 C. Cls. 546; plaintiff entitled to recover.

Upon a report from the General Accounting Office showing the amount due in accordance with the opinion of the court, judgment for the plaintiff was entered in the sum of $326.67.

No. 43923. JUNE 2, 1941

Arthur Pelzer.

Income tax; exclusion of gifts made to trust funds for the benefit of individual donees.

Judgment for the plaintiff, 90 C. Cls. 614; 91 C. Cls. 683.

Reversed in part by the Supreme Court March 3, 1941, 312 U. S. 399.

On mandate of the Supreme Court and in accordance with a stipulation filed May 21, 1941, in which it was stated "that in accordance with the mandate of the United States Supreme Court * * * there is no overpayment of gift tax in the above entitled case and that judgment may be entered for the United States and the petition dismissed," it was ordered that the petition be dismissed.

No. F-373. JUNE 2, 1941

The Creek Nation.

Indian claims; decrees of Dawes Commission under Curtis Act.

Defendant's demurrer to plaintiff's second amended petition sustained, and petition dismissed.

See *The Creek Nation* v. *United States* (No. F–373), 92 C. Cls. 346.

No. 44007. JUNE 23, 1941

Herbert Rivington Pyne et al.

Income tax; deduction of attorney's fees in management of estates by executors and trustees; definition of "business."

Decided October 7, 1940; judgment for plaintiffs. 92 C. Cls. 44.

In accordance with the decision of the Supreme Court, April 28, 1941 (313 U. S. 127), *post* p. 773, vacating the judgment of the Court of Claims, and remanding the case for further proceedings in conformity with the opinon that day announced, it was ordered that the petition be dismissed.

CASES DISMISSED BY THE COURT OF CLAIMS ON MOTION OF PARTIES, OR OF THE COURT FOR NONPROSECUTION

Cases Pertaining to Refund of Taxes

ON MARCH 3, 1941

43105. Frederick W. Eckels et al.
44323. Ship Channel Compress Company, Inc.
44324. Wilmington Terminal Warehouse Company.
44325. The Sprunt Corporation.
44326. Alexander Sprunt and Son, Inc., of Texas.
44327. Alexander Sprunt & Son, Inc.
44795. United States Metals Refining Company.
44796. American Zinc & Chemical Co.
44797. Blackwell Zinc Company, Inc.
44798. The American Metal Co., Ltd.
44799. The American Metal Company of New Mexico.
44800. C. H. Spitzner & Son, Inc.
44818. North American Cement Corp.
44819. C. F. Mueller Company
44838. Alexander Smith & Sons Carpet Company
44841. Intertype Corporation.
44860. Julius Forstmann & Co., Inc.
44861. Julius Forstmann Corporation.
44862. Forstmann Woolen Co.
44920. George W. Helme Company.
44950. Tennessee Eastman Corporation.
44951. Eastman Kodak Company, to the use and benefit of Eastman Kodak Company, a New Jersey corporation.
44952. Eastman Kodak Company, a New Jersey Corporation.
45223. Ernest L. Chandler and The First National Bank of Malden, Executors under the Will of John G. Chandler, deceased.
45243. The A. Polsky Company, a Corp.
45244. Titche-Goettinger Company, a Corp.
45245. Morehouse-Martens Company, a Corp.
45246. L. H. Field Company, a Corp.
45247. Joske Bros. Company, a Corp.
45248. C. F. Hovey Company, a Corp.
45249. O'Neill & Company, Inc., a Corp.
45250. Allied Stores Corporation, Successor to and doing business as The Bon Marche.
45259. Eastman Kodak Company, a New Jersey Corporation.
45260. Eastman Kodak Company, to the use and benefit of Eastman Kodak Co., a New Jersey Corporation.
45261. Tennessee Eastman Corporation.
45274. Stella L. Stern.

ON MARCH 7, 1941

43498. Raleigh Lumber Company, etc.
43499. W. N. Ritter Flooring Corp.
43500. Knox Creek Railway Co.

ON APRIL 7, 1941

42017. Pacific Mills.
44021. Bliss Fabyan & Co.
44403. Hubert W. & Emily A. Lehr.
44697. Worcester County Trust Co.
44814. Cuban Tobacco Co.
44815. Nashville Tobacco Works.
44857. J. & P. Coats (R. I.).
44866. Mathilde Townsend Welles.
44873. Clark Thread Company.
44916. Atlas Powder Company.
44917. Atlas Powder Company.
44948. J. Lester Eisner.
45031. May Depew.
45192. Henry C. R. Williamson.
45309. Mohawk Cotton Mills.
45325. Caroline C. Dommerich et al.

ON MAY 5, 1941

43997. Geo. M. Forman & Co.
44006. Minnie Hartford Reilly.
44655. Minnie Hartford Reilly.
44783. William Winter & Son.
45134. Northwestern National Bank and Trust Company, et al., extrs.
45201. Louise Clifton Williamson, extrx.
45254. Arthur Barnwell.
45396. Natalie du Pont Edmonds.

Cases Pertaining to Fleet Pay, Marine Reserve Corps

ON MARCH 3, 1941

(Following the decision in the case of Frank L. Ach, 91 C. Cls. 532)

43330. Robert H. Winn.
43332. Willard L. Hart.
43334. Harold C. Smith.
43335. Earl C. Lane.
43357. William R. Sheets.
43358. Glenn P. McAtee.
43359. John T. Irwin.
43360. John B. Berry.
43493. Dwight L. Harris.
43920. Donald T. Winder.
43973. Ralph B. DeWitt.
43974. E. Cortland Parker.
43975. Windsor B. W. Stroup.
43978. Katharine Shaw Vandoren, admx. of Lucian H. Vandoren.
43984. Henry A. Schweinbaut.
43985. Ned Morris.
44046. Wolcott C. Waggaman.
44658. Chauncey G. Parker, Jr.

Cases Pertaining to the Transportation of Troops

(Following decision in No. 43475, The Pennsylvania Railroad Company)

ON MARCH 3, 1941

43496. The Baltimore & Ohio Rd. Co.
43510. Lehigh Valley Rd. Company.
43511. The Long Island Rd. Company.
43526. The N. Y. C. Rd. Co.

Cases Involving Pay and Allowances

ON APRIL 7, 1941

43246. Elwood C. Madsen.
Dept. 173. Frances de Roulhac Moreno.

ON MAY 5, 1941

43820. Joseph John Gullik.

ON MAY 14, 1941

45311. Herbert B. Hayden.

Cases Involving Indian Claims

ON MAY 5, 1941

H-37-B. Choctaw and Chickasaw Nations.
J-620. Choctaw and Chickasaw Nations.
K-187. Choctaw Nation.
K-281. Choctaw Nation.

Case Involving Government Contract

ON MARCH 3, 1941

44779. Taylor Bedding Manufacturing Company, a Corporation.

Case Involving Infringement of Patent

ON APRIL 7, 1941

43608. B. O. Lowndes Wells, Admr. of Rexford M. Smith.

Miscellaneous

ON MAY 5, 1941

44969. Batavia Mills, Inc.
45028. Batavia Mills, Inc.
45029. Batavia Mills, Inc.



REPORT OF DECISIONS

OF

THE SUPREME COURT

IN COURT OF CLAIMS CASES

THE SEMINOLE NATION v. THE UNITED STATES

[No. L-207]

[92 C. Cls. 210; 313 U. S. —]

Indian claims; sale of townsite lots to Principal Chief of Nation; allegations of fraud.

Decided October 7, 1940; petition dismissed. Plaintiff's motion for new trial overruled January 6, 1941.

Plaintiff's petition for writ of certiorari denied by the Supreme Court April 14, 1941.

THE UNITED STATES, PETITIONER, v. HERBERT RIVINGTON PYNE, GRAFTON HOWARD PYNE, MARY PYNE FILLEY, AND PERCY R. PYNE, JR., EXECUTORS OF THE ESTATE OF PERCY R. PYNE

[No. 44007. Decided October 7, 1940]

[92 C. Cls. 44; 313 U. S. 127]

Certiorari to review a judgment of the Court of Claims holding that where residue of decedent's estate, consisting largely of corporation stocks, was left in trust to his sons and daughters as trustees, who were also executors, and where said trustees were persons of limited business experience; and where the attorney's services consisted chiefly in advising the executors as to the best means of conserving the estate and as to what investments to dispose of and what other investments to make, the attorney and executors were engaged in business, "in the business of conserving the es-

tate and protecting its income," and that the fees paid by the estate to the attorney for such services were expenses deductible for income-tax purposes.

The judgment of the Court was *vacated* April 28, 1941, the Supreme Court deciding:

> 1. Executors in caring for securities and investments in order to conserve and protect the estate pending final distribution are not carrying on business within the meaning of Sections 23 (a), 161, and 162 of the Revenue Act of 1934, whatever the size of the estate or the number of those whose services are required in its conservation; and fees paid to an attorney for advice on legal and economic questions arising in the course of administration of the estate are not deductible in computing their income tax under that Act.
>
> Therefore, a finding of the Court of Claims that the executors continued to conserve the decedent's estate as he had when he was himself "a financier and investor" falls short of a finding that they were entitled to a deduction accorded by Congress only to those "carrying on . . . business."
>
> 2. This Court will not weigh the facts set out in subsidiary findings of the Court of Claims to supply an ultimate and determinative finding which that court failed to make but which is necessary to support the judgment.

The opinion of the Supreme Court was delivered by Mr. Justice Black, as follows:

> The question presented is whether upon this record the Court of Claims committed error in concluding that respondents, as executors, were, in computing their federal income tax, entitled to deduct expenses properly incurred in the administration of an estate, Congress having provided that such a deduction could be taken only by individuals, estates, or trusts engaged in "carrying on . . . business." Revenue Act of 1934, § § 23 (a), 161, 162. Compare *City Bank Farmers Trust Co.* v. *Helvering*, just announced (313 U. S. 121).
>
> In computing the 1934 net income of the estate, respondents claimed a deduction of $40,000 for fees paid to the estate's attorney during the taxable year. The Commissioner of Internal Revenue disallowed the deduction; the respondents paid under protest, and filed suit for refund in the Court of Claims. Their com-

plaint alleged that "The payment of attorney's fees and the claim for allowance thereof as a deduction from gross income is predicated upon the contention that the tremendous size of the corpus of the estate and the proper administration thereof constituted the operation of a business and the employment of an attorney as counsel to guide the executors in the handling of the affairs of the estate was just as much a necessary expense of the estate as is incurred in the operation of any commercial business engaged in the manufacturing or selling of commodities." The court made detailed findings of fact, and as its single conclusion of law stated that the respondents should recover.

We recently stated in *Higgins* v. *Commissioner*, 312 U. S. 212, that determination of what amounts to carrying on business requires examination of the facts in each case. In this case, the record before us contains the findings of the Court of Claims, a conclusion of law, and an opinion summarizing the findings of fact and indicating the reasons which prompted the court to reach its conclusion of law. The most that can be said of the findings of fact is that the court was of the opinion that the facts found showed that the activities of the executors were such as to meet certain criteria set out in the opinion as determinative of what constituted carrying on business. For what the court found as a fact was that the decedent, prior to his death "was engaged in business as a financier and investor, maintaining an office where he employed an office manager and an average of six clerks. . . . In general, the operations of the estate continued in substantially the same manner after the decedent's death as before. . . ." In addition the court found that the attorney employed by the executors "was called upon to advise them with reference to matters both legal and economic that arose in the business activities of the estate, with reference to federal estate and state inheritance taxes, and also in regard to the acquisition and disposal of the estate's securities and in regard to various matters pertaining to companies in which the estate held investments." But the executors might do all the things that the court found that they did and still not be engaged in "carrying on . . . business" within the meaning of the Revenue Act. For as we said in the *Higgins* case, "All expenses of every business transaction are not deductible. Only those are deductible which relate to carrying on a business."

Also, we there sustained a holding that an individual who was engaged in financial and investing activities in all ways similar to those of the decedent and his executors in this case was not entitled to a deduction such as that sought by respondents. Therefore, the finding of the Court of Claims that the executors continued to conserve the decedent's estate as he had when he was himself "a financier and investor" falls far short of a finding that the executors were entitled to a deduction accorded by Congress only to those "carrying on . . . business." Failure of the Court of Claims to make a specific finding on this ultimate and determinative issue deprives that court's judgment of support. Under such circumstances we are not called upon to weigh the different facts set out in the subsidiary findings in order to determine whether or not they would support a conclusion that the executors were "carrying on . . . business" within the meaning of the statute.[2]

When we turn to the opinion of the Court of Claims,[3] it is made clear that absence of such a specific finding was the result of the court's adoption of criteria of "carrying on . . . business" inconsistent with our holding in the *Higgins* case. Since the judgment must be vacated because not supported by adequate findings, it is appropriate that we point out this inconsistency. Accepting as true the statement of the Court of Claims that a broad definition of "business" might be that it is "whatever engages the time, attention, and labor of men in order to conserve what they have or to avoid loss" it does not follow at all that this is synonymous with the statutory language, "carrying on . . . business." This definition of "business" stems in part from the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, upon which the Court of Claims relied. But however applicable that definition may have been to the case there under consideration, it cannot be accepted as a guide in the present case. The reasons why it is not applicable to the statutory provision now under consideration were given in our opinion in the *Higgins* case; its nonapplicability to specific situations has also been explained in a number of other opinions of this Court.[4]

[2] *United States* v. *Esnault-Pelterie*, 299 U. S. 201, 206.

[3] Cf. *Chippewa Indians of Minnesota* v. *United States*, 305 U. S. 479, 481; *American Propeller & Mfg. Co.* v. *United States*, 300 U. S. 475, 479–480.

[4] See, e. g., *Van Baumbach* v. *Sargent Land Co.*, 242 U. S. 503, 514–515; *McCoach* v. *Minehill & Schuylkill Haven R. R.*, 228 U. S. 295; 303; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187, 190.

Nor can the judgment of the Court of Claims be supported by that court's statement that the executors were engaged "in the business of conserving the estate and protecting its income." Such activities are the traditional duty of executors. Executors who engage actively in trade and business are the exception and not the rule. Rather obviously, there could be clear cases where executors "carry on . . . business" by continuing to operate a store, a factory or some other well known, well marked type of business activity. But in the absence of evidence showing activities coming within the general acceptation of the concept of carrying on a trade or business, it cannot be said as a matter of law that an executor comes into this category merely because he conserves the estate by marshalling and gathering the assets as a mere conduit for ultimate distribution. And determination of what constitutes "carrying on . . . business" under the Revenue Act does not depend upon the size of the estate or the number of people whose services are required in order properly to conserve it.

The judgment of the Court of Claims is vacated and the cause is remanded to that court for proceedings in accordance with the views herein expressed.

WRIGHTSMAN PETROLEUM COMPANY, A CORPORATION, FOR ITSELF AND C. J. WRIGHTSMAN, ITS SOLE STOCKHOLDER AND BENEFICIARY IN DISSOLUTION, v. THE UNITED STATES

[No. 43387]

[92 C. Cls. 217; 313 U. S. —]

Income tax; claim for refund; timely amendment; statute of limitations.

Decided October 7, 1940; petition dismissed. Plaintiff's motion for new trial overruled January 6, 1941.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 26, 1941.

THE CREEK NATION v. THE UNITED STATES

[No. L-234]

[92 C. Cls. 269; 313 U. S. —]

Indian claims; reservation of riparian rights in allotments on river banks.

Decided November 12, 1940; petition dismissed. Plaintiff's motion for new trial overruled February 3, 1941.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 26, 1941.

THE UNITED STATES v. NUNNALLY INVESTMENT COMPANY

[No. 42389]

[92 C. Cls. 358; 313 U. S. —]

Income tax records and returns on a cash basis; suit on different issues not estopped by reason of prior case.

Decided January 6, 1941; judgment for the plaintiff.

Defendant's petition for writ of certiorari *denied* by the Supreme Court May 26, 1941.

THE FRANKLIN LIFE INSURANCE COMPANY v. THE UNITED STATES

[No. 45045]

[Ante, p. 259; 313 U. S. —]

Transfer tax under Title VIII of the Revenue Act of 1926, as amended; life insurance policies registered under Illinois law.

Decided March 3, 1941; petition dismissed.

Plaintiff's petition for writ of certiorari *denied* by the Supreme Court May 26, 1941.

INDEX DIGEST

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CONTRACTS.

I. Where plaintiff sold to a firm of contractors, on title-retaining contract, one reconditioned dragline with certain equipment; and where said contractors entered into a contract with the Government to install sewer and storm drainage systems at a naval air station, and began work on said job, utilizing the said dragline and equipment; and where later said contractors, having previously defaulted on said purchase contract, abandoned the work before completion, leaving the said dragline and equipment on the site of the job, and the work was thereafter completed by the Government, which used the said dragline and equipment only for about 16 hours on October 4 and 5, 1932; and where later verbally, and on October 20 and 21, 1932, in writing, the Government was notified that title to said dragline and equipment vested in plaintiff; and where said dragline and equipment were not used by the Government after such notice of ownership; it is *held* that there was no liability for use on the part of the Government and the plaintiff is not entitled to recover. *Excavating Equipment Dealers*, 82.

II. In order for the Government to be bound by a contract for the use of such property it would be necessary for the duly authorized public authority, the Bureau of Yards and Docks, either to have made an express contract for the use, or to have conducted itself in such a way that there would be an implied contract to retain for use and to pay the reasonable rental value for such use or retention for use. *Id.*

III. If there was any unreasonable delay or negligence on the part of the Government officials in releasing the machine, it would be a matter of tort and not of contract; and therefore not within the jurisdiction of the Court of Claims at the time the cause of action in the instant case arose. *Id.*

IV. Retention for use, including actual use, made of the dragline prior to October 17, was pursuant to the express provisions of article 9 of the contract between the firm of contractors and the Government; and before anyone connected with the Government had any notice or knowledge of any claim of interest by the plaintiff. *Id.*

V. Where there was no meeting of the minds, either express or implied by circumstances, at a time when the defendant had no knowledge of plaintiff's claim of

CONTRACTS—Continued.

interest, and where plaintiff did not know the machine was in the custody of the defendant, there could be no priority of contract, and hence no liability on the part of the defendant to the plaintiff. *Id.*

VI. Where on January 12, 1933, the plaintiffs entered into a contract with the defendant, by the terms of which plaintiffs agreed to furnish all labor and materials and to perform all work required for wrecking and removing old buildings and constructing 17 new buildings for the Veterans' Administration at San Francisco, California, and for the reconditioning and rebuilding of two other structures, including fences, gates, roads, walks, grading, and drainage; and where plaintiffs performed said work and completed said buildings and other phases of the contract; and where delay was caused and a revision of the plans was necessitated by the discovery of unforeseen conditions in connection with the foundations of Building No. 2; it is *held* that the plaintiffs are entitled to recover. *Baruch*, 107.

VII. Where extra costs are incurred by contractor due to unforeseen or unknown conditions in construction or excavating foundation of buildings, the changes thereby required are not necessarily reasonable changes contemplated in the contract, and contractor may recover the actual costs thus incurred. *Rust Engineering Co. v. United States*, 86 C. Cls 461, 475, cited. *Id.*

VIII. Where, in pursuance to the Government's economy program, orders were given to the plaintiff by the defendant to discontinue work on Building No. 1, with a view to the possible elimination of said building from the project, and work was accordingly stopped for 116 days, at the expiration of which time, by order of the defendant, work on said building was resumed and ultimately completed; it is *held* that the delay so caused was not the fault of the contractor and plaintiffs are entitled to recover the actual and necessary costs thereby incurred. *Id.*

IX. Where a contracting concern entered into a contract with the Government to furnish all labor and material and perform all work required for the complete installation of an extension to the existing steam heating plant and installing a new steam distribution system at the Naval Ammunition Depot, Fort Mifflin, Pa., and the plaintiff as surety executed a completion bond for the contract; and where the defendant before completion terminated the contractor's right to proceed and called upon plain-

FLOOD CONTROL.

I. Where in an action for damages to property by reason of the Flood Control or Jadwin Plan, on the Mississippi River, there is no allegation in the petition of a past or consummated inundation or damage, and where the damage alleged is prospective upon the "abandonment

INDIAN CLAIMS—Continued.

VII. Payment made to the United States Indian Agent in accordance with the provisions of section 11 of the Act of April 26, 1906, must be allowed as a credit to the defendant on payments authorized by article VIII of the treaty of 1856. *Id.*

VIII. Where under article III of the treaty of March 21, 1866, the Government agreed to pay annually 5 percent interest on $50,000, or $2,500 annually, for "the support of schools," and where during the fiscal years 1867 to 1874, both inclusive, of the $20,000 theretofore appropriated for payment of accrued interest on said school fund, only $16,902.80 was disbursed by the defendant for educational purposes; it is *held* that the defendant is liable for the balance due, $3,097.20. *Id.*

IX. Where during the years 1875 to 1879, both inclusive, payments of $57,500 made to the tribal treasurer by the defendant may have been unauthorized but where it appears that the tribal treasurer disbursed annually for the maintenance of tribal schools an amount in excess of the amount the tribe was obligated to expend for schools; it is *held* that since the schools received the money the defendant is not liable. *Id.*

X. Where the amount of $750.00 due for the year 1907 was paid to the Indian Agent under the authority of section 11 of the Act of April 26 1906, it is *held* the plaintiff cannot recover. *Id.*

XI. Where under the provisions of article VI of the treaty of March 21, 1866, the Government agreed to erect an agency building on the Seminole reservation "at an expense not exceeding ten thousand dollars"; and where an appropriation of $10,000 for erection of an agency building was made by the Act of July 28, 1866, which amount was not used and was returned to surplus; and where by the Act of May 18, 1872, the sum of $20,000 was appropriated to replace the unused appropriation of 1866 for the erection of an agency building pursuant to the Creek treaty; and where it appears that $9,030.15 of the $10,000 appropriated for the Seminole Agency was expended for some purpose; and where it appears that an agency building was in fact erected in the year 1873; and where there is no showing by the plaintiff that such agency building was not suitable; it is *held* that there was no violation of the said article VI of the treaty and plaintiff is not entitled to recover. *Id.*

INDIAN CLAIMS—Continued.

XII. It is *held* that although section 19 of the Curtis Act, prohibiting payments to any of the tribal governments or to any officer thereof, is applicable to the Seminole Nation, such prohibition applied only to the payment of *per capita* payments. *Id.*

XIII. It is *held* that although the Curtis Act did prohibit the making of these *per capita* payments to the tribal treasurer, and they were so made in violation of its terms; the Curtis Act did not create in the individual Indians any vested rights, it did not constitute an agreement with the tribe for the benefit of its individual members, but was merely a direction to the agents of the United States. *Id.*

XIV. Where it is not disputed that the Seminole National received certain money, though improperly disbursed, and said money was paid to it in pursuance of a request of the General Council of the Nation, it is *held* that the Seminole Nation cannot maintain an action for the payment of said money for a second time. *Id.*

XV. Where defendant under the treaty of 1866 was obligated to provide 200,000 acres of land for the use of the Seminoles, and where the original reservation consisted of only 188,449.46 acres, or a shortage of 11,550.54 acres; and where in the adjustment of the boundary between the Seminole and Creek reservations an additional 175,000 acres were purchased at $1 per acre from the Creeks and added to the Seminole reservation; it is *held* that under the Act of August 12, 1935, the defendant is entitled to an offset of $1 per acre for the excess 165,847.17 acres, or $165,847.17 *Id.*

XVI. Where a prior decision in the instant case (82 C. Cls. 135) was reversed by the Supreme Court (299 U. S. 417) and where following such reversal an amendatory act was passed enlarging the period of limitations and where subsequently a second amended petition was field in accordance with the provisions of the amendatory act; it is *held* that as to all issues not finally disposed of at the former trial the instant case is not a case that had been "tried or submitted" within the meaning of the Act of August 12, 1935 (49 Stat. 571, 596). *Id.*

XVII. Where under the agreement with the Seminoles ratified by the Act of July 1, 1898, providing for the allotment of tribal lands to the individual members of the tribe,

INDIAN CLAIMS—Continued.

there was no express provision that the United States should bear the expense of said allotment; it is *held* that an obligation to bear such expense cannot be implied. *Choctaw Nation* v. *United States*, 91 C. Cls. 320 cited. *Id.*

XVIII. Where by the Act of April 21, 1904, Congress made appropriation for tribal schools and provided that such schools might be attended by children of nonmembers of the Indian tribes, and where such schools were in fact attended by white and Negro children as well as by children of the Indian tribes; said schools being maintained both by appropriations from Congress and tribal funds; it is *held* that such funds so expended not only for the benefit of the plaintiff but also for the benefit of white and Negro children cannot be charged against the plaintiff as gratuities. *Id.*

XIX. Under the decisions of the Court of Claims and of the Supreme Court (see *The Sisseton and Wahpeton Bands of Indians*, 42 C. Cls. 416, 429; 208 U. S. 561, 567), it is *held* that the defendant is entitled to an offset against the claims of plaintiff of a proportionate amount of the sums spent for the joint benefit of the Seminole and other tribes of Indians. *Id.*

XX. Where the defendant in 1881 purchased from the Creek Nation, plaintiff, 175,000 acres of plaintiff's lands immediately east of the so-called "Creek dividing line," and where in surveying said tract the defendant ran the eastern line thereof at such a distance from the "Creek dividing line" as to include 176,198.99 acres instead of 175,000 acres, all of which 176,198.99 acres were allotted and patented to members of the Seminole tribe, by whom they were occupied; and where in 1889 by treaty, the Creek Nation granted to the defendant all of its lands except so much of the former domain of said Creek Nation "as lies east of the said line of division, surveyed and established as aforesaid, and is now held and occupied as the home of said nation;" it is *held* that the plaintiff is not entitled to recover, since no part of the said 176,198.99 acres was "held and occupied as the home of" said Creek Nation when the agreement of 1889 was entered into. *Creek Nation* (L–205), 561.

XXI. Where in executing the treaty of 1898 the parties acted under a mutual misapprehension of facts as to the proper location of the eastern boundary of the tract but not as to the lands actually occupied by the Creeks;

TAXES—Continued.

INCOME TAXES—Continued.

XV. (15) Where plaintiff on October 10, 1931, filed its original petition in the instant case, reciting that it had on September 14, 1929, filed a claim for refund for taxes paid in 1926 for the years 1918 and 1919, on the ground that the assessment and collection of said taxes had been barred by the statute of limitations, and reciting, further, that it had on October 11, 1929, filed claims for refund for the taxes paid in 1926 for the years 1918 and 1919 on the ground that the Commissioner had refused to allow as deductions payments made to employees, which payments plaintiff claimed to be compensation for services; and where, after the Commissioner of the Court of Claims on June 6, 1936, had made his report, the plaintiff thereafter on April 4, 1938, filed its amended petition reciting it had filed claims for refund on December 13, 1926, October 11, 1929, and September 27, 1930, and reciting further the action and the failure to act of the Commissioner of Internal Revenue thereon; and where the Commissioner of Internal Revenue had treated the claims of October 11, 1929, as requests for reconsideration of his former rejection on August 3, 1927, of the claims of December 13, 1926, and on April 11, 1930, had denied the application to reopen said claims; it is *held* that the instant suit was begun on April 4, 1938, when the amended petition of plaintiff was filed, and is accordingly barred by the statute of limitations; having been instituted eleven years after payment, where only five years are permitted, and nine years after rejection, when only two years are permitted. *Ragan-Malone Company*, 316.

XVI. (16) Where plaintiff's original petition filed in 1931 recited in an intermediate paragraph that claims for refund had been made on the grounds relied on in the instant suit and was specific in stating the grounds upon which it claimed that "said sum is erroneously, illegally, and wrongfully withheld" from the plaintiff; it is *held* that neither the paragraph quoted nor the petition as a whole contained any general language which could include the ground asserted in the amended petition and exclusively relied on by plaintiff in the instant suit. *Id.*

TAXES—Continued.

INCOME TAXES—Continued.

properties of said corporation; it is *held* that said corporation was not a party to reorganization under the provisions of the Revenue Act of 1928. *Id.*

XXIV. (24) Where during the entire fiscal year of plaintiff ending January 31, 1929, the entire capital stock of plaintiff was owned by an individual, or his estate, which from February 1, 1928, to June 30, 1928, also owned 96.5 percent of the stock of another corporation; and where said affiliated corporations showed a net operating loss for 1928; it is *held* that plaintiff was entitled, in its income tax return for the fiscal year ending January 31, 1929, to deduct the losses of affiliate incurred in 1928 on the proportional basis provided in section 105 of the Revenue Act of 1928, and plaintiff is entitled to recover. *John Wanamaker Philadelphia*, 356.

XXV. (25) Where evidence produced by plaintiff is not sufficient to establish that certain debts of affiliate were definitely ascertained to be worthless during the period from February 1 to June 30, 1928, which was the period of affiliation, or that said debts were charged off during that period, it is *held* that plaintiff is not entitled to the claimed deduction for said debts and is not entitled to recover. *Id.*

XXVI. (26) Where plaintiff in its 1929 return claimed a deduction on account of "stocks liquidated," and where said stocks admittedly became worthless in 1929; it is held that the cost price of said stocks acquired in 1922 and in later years having been satisfactorily proved, plaintiff was entitled to the claimed deduction and is entitled to recover. *Id.*

XXVII. (27) Where plaintiff in its consolidated income tax return for its fiscal year ending January 31, 1923, had been allowed as a deduction the operating loss of an affiliated corporation; and where in the instant suit plaintiff asserts a claim for deduction as a loss the difference between the value of its proportionate share of the assets of said corporation at the time said assets were turned over to the trustee for liquidation in 1922 and its share of the proceeds of such liquidation in 1929; it is *held* that the liquidation of said affiliated

TAXES—Continued.

INCOME TAXES—Continued.

corporation was not completed in 1922 but in 1928, and plaintiff is not entitled to the deduction claimed, as above, in 1929. *Id.*

XXVIII. (28) Under the doctrine of *Ilfeld Co.* v. *Hernandez*, 292 U. S. 68, taxpayer, having had the benefit of a loss on account of an affiliated company in a prior year, must subtract that loss from any loss suffered in a later year on account of the liquidation of its interest in that affiliate, and can claim a deduction only for the excess loss, if any. *Id.*

XXIX. (29) Where plaintiff a manufacturing concern operating a plant at Frankford, Pa., and another at Philadelphia, Pa., as well as the main plant at Staten Island, N. Y., in 1936 erected a new building in connection with said main plant and removed to said new building the machinery and equipment from the said Philadelphia plant, and later sold the building in Philadelphia which had been abandoned for its purposes; and where the evidence shows that such consolidation was made not because of the inadequacy or unsuitability of said abandoned building in Philadelphia but for purposes of economy in operation; it is *held* that plaintiff is not entitled under section 23 of the Revenue Act of 1936 and the applicable Treasury Regulations to deduction for obsolescence of the said abandoned building in its income tax for 1936. *White Dental Manufacturing Co.*, 469.

XXX. (30) It is practically impossible to find a definition of obsolescence that may be applied generally to all cases. *Id.*

XXXI. (31) To establish obsolescence for purposes of income tax deduction it is required that the taxpayer show that the physical properties are being affected by economic conditions that will result in abandonment at a date prior to the end of the normal useful life of said properties; that the time of beginning of obsolescence be shown; and that a reasonably definite time be ascertained when said properties will be obsolete. *Id.*

XXXII. (32) Where a manufacturing plant is abandoned only because of the erection of an addition to another plant to which the activities of the said abandoned plant are transferred, for operating economies; it is *held* that taxpayer is not entitled

TAXES—Continued.

EXCISE TAX—Continued.

LIV. (16) Where there was some inducement for a person to play a machine by himself but where the greatest enjoyment from its use was in competition with others, it is *held* that said machine comes within the definition of the word "game" as set forth in *White* v. *Aronson*, 302 U. S. 16. *Id.*

ESTATE TAX.

LV. (1) Where the Commissioner of Internal Revenue included in decedent's gross estate a proportionate amount of the sum shown to be owing to decedent by a corporation in which decedent was owner of one-half of the stock, said proportionate amount being calculated on the balance sheet of said corporation introduced in evidence and not contested; it is *held* that the valuation placed on said account by the Commissioner was not excessive and plaintiffs are not entitled to recover. *Brown*, 217.

LVI. (2) Where the Commissioner of Internal Revenue disallowed as a deduction the amount of $3,500 paid by decedent's executors in settlement of decedent's liability on a note of $6,000 signed by decedent as surety for another, it is *held* that such deduction was allowable and plaintiffs are entitled to recover. *Id.*

LVII. (3) Where the Commissioner disallowed the sum of $750, being the balance due on a note for $1,000 executed by decedent to a hospital building fund association, payable in optional installments and contingent upon the raising of a given amount for said hospital fund, and where decedent on demand did not pay the note in full and instead paid certain installments in accordance with the optional terms of the note; it is *held* that at the date of decedent's death said note being nonnegotiable and in the hands of the original payee was an installment note and not a demand note. *Id.*

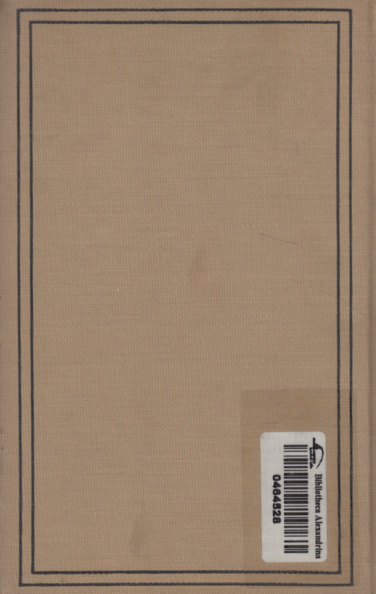
LVIII. (4) Where all the installments due on a note executed by decedent had matured more than six years prior to decedent's death except the installments maturing on October 15, 1930; April 15, 1931, and October 15, 1931; it is *held* that the statute of limitations began to run as soon as a right of

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